

Vol 1

NOT AVAILABLE FOR LOAN

THE STATUS OF RHODESIA

IN

INTERNATIONAL LAW

BY

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P R E F A C E.

This thesis is the result of my research into some of the main problems concerning Rhodesia since its Unilateral Declaration of Independence in 1965. In this task I was greatly assisted by my supervisor Dr. Giel Visagie, to whom I am indeed much indebted. His prompt and unfailing interest, his carefully considered and helpful suggestions were at all times a source of inspiration. It is chiefly due to his assistance and experience that I hope to avoid many of the pitfalls inherent in undertaking a work of this nature. I would also like to pay tribute here to my late supervisor, Professor Donald Molteno, who died in December, 1972. Again I am indebted to him for the interest which he took in, and the careful attention which he paid to, the progress of this thesis, despite the fact that he was handicapped by grave illhealth. His tenacity and devotion to duty in the face of adversity were also in inspiration. I would also like to thank Professor James Gibson for agreeing to become my supervisor in place of Professor Molteno at a very late stage when the thesis had actually been completed and was in the course of preparation.

Finally my thanks and gratitude go to my wife and to the clerical staff at the University of Cape Town Law Faculty without whom, of course, this work would not have appeared.

Cape Town.

April, 1973.

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S U M M A R Y.

This thesis deals with the international law position of those entities which may be said to have status in relation to the territory known as Rhodesia (or Southern Rhodesia, if one is to give it its original name). These entities are the State of Rhodesia, the Government of Rhodesia, the People of Rhodesia and the United Kingdom which claims to exercise sovereignty over the territory of Rhodesia. Since the ambit of the thesis concerns the international law position of these entities it follows that other international law problems relating to Rhodesia, which concern third states and international organizations, fall outside its scope. These latter problems relate to obligations of third states and competences of international organizations to take action in the Rhodesian situation and do not relate to the status of Rhodesia itself. This thesis therefore does not deal with such matters as the imposition of sanctions by the United Nations and the obligations of member states to participate in them. However, where obligations of third states are inextricably connected with the status of the territory itself, it is necessary to treat them. Thus the "duty not to recognize" Rhodesia owed by third states received full treatment in all its various facets for recognition is a concept which is of cardinal importance in considering status.

For the purposes of exposition the thesis is divided into two main parts, a historical part and a contemporary part. It must be stressed that the historical part is of an introductory nature only. The purpose is merely to provide background information for the treatment of the relevant contemporary legal problems. It does not in any way claim to be an exhaustive exposition of the matters/ ..

matters with which it deals but is more in the nature of a summary. The historical part comprises the first two chapters of the thesis. Chapter I is entitled "Summary of the Constitutional Position of Southern Rhodesia up to 11th November, 1965." This outlines the constitutional structure of the Protectorate of Southern Rhodesia, 1894-1923 and the Colony of Southern Rhodesia, 1923-1965. It describes specifically the legislative, executive and judicial powers, the franchise and human rights pertaining at different times. The effect of the creation and dissolution of the Federation of Rhodesia and Nyasaland, 1953-1963, on the constitutional structure of the Colony is also described. Finally a review of the abortive negotiations between the United Kingdom and Southern Rhodesia Governments, 1963-1965, on the question of independence for Southern Rhodesia is given. This latter review attempts to highlight the important points of difference between the parties which constituted obstacles in the path of a grant of independence to Rhodesia.

Chapter II is entitled "The International Status and Personality of Southern Rhodesia before 11th November, 1965." This Chapter considers the international status of the territory under Lobengula, its status as a British sphere of influence, as a Protectorate and as a Colony. The effect of the creation and dissolution of the Federation of Rhodesia and Nyasaland on the status of the territory, the international status of the Federation and of the former British South Africa Company are also considered. The question whether Southern Rhodesia could be regarded as a non-self-governing territory within the meaning of Article 73 of the United Nations Charter between 1945 and 1965 is then discussed. Finally the extent of Southern Rhodesian international personality before 1965 is considered. Here its personality as a member of

various/

various international organizations, as a party to treaties, as the possessor of diplomatic rights and a right of protection and as a bearer of international responsibility are described.

The second main part of the work, dealing with contemporary problems encountered, is entitled "Rhodesia since the Unilateral Declaration of Independence." This part deals with the international law position of the entities which may be said to have status in relation to the territory known as Rhodesia. It comprises four Chapters.

Chapter III is entitled "The State of Rhodesia". This chapter commences with an analysis of the nature, effect and legality of the Unilateral Declaration of Independence. The act is seen as one which attempts to make certain constitutional and international law changes in the status quo. In the international law sphere it is seen as the employment of the device of notification and as a result affording an opportunity for the employment of the devices of protest and recognition by other states. The constitutionality of the act naturally receives considerable attention and the international law significances of the unconstitutional act are discussed. The legality of the declaration from the point of view of international law is considered as also are various allegations that the declaration constituted an act of aggression, an infringement of the principle of self-determination, an act of irresponsibility and a violation of the basic policies of the Charter of the United Nations.

The question whether Rhodesia fulfils the criteria of independent statehood is next examined and the answer found to be in the affirmative. In considering this question it has been necessary to examine in some depth the newly proposed requirements of independent statehood, viz. the requirement that a state should not only

be effective in the traditional sense of exacting habitual obedience but should also be effective in making and executing all those decisions that a good government should make and the requirement that a state should not be a "manipulated" state.

The next topic brings us to the heart of the thesis, the question being whether recognition of a state is a prerequisite for the enjoyment of international personality. This involved an examination of the doctrinal dispute concerning the Constitutive and Declaratory theories of recognition. The two theories are outlined and the impossibility of avoiding a preference for one or the other is discussed. Attention is also drawn to the fact that juristic writings, state practice and court decisions are completely at variance on the matter. The arguments in favour of each of the theories and the compromise approaches are analysed and discussed. After considering these, conclusions are then expressed on the nature of the act of recognition as being essentially unilateral, discretionary, constitutive and a matter of intention in relation to its existence, scope, retrospectivity and prospectivity. Views are then expressed on the nature of international personality and of international society. Since the controversy concerning the constitutive or declaratory role of recognition is vital to the status of Rhodesia, and as many other views expressed in other parts of this thesis depend on the answer to this question, it was felt that the matter should be examined in depth and that is why the writer has devoted over one hundred pages to the topic.

Lauterpacht's controversial theory that there is a duty to recognize a state which meets the test of independent statehood is next examined in the light of state practice and conceptual and juristic problems. The theory is rejected and the conclusion is

preferred that there is no duty to recognize Rhodesia.

The duty not to recognize prematurely is then considered and found not to be applicable to Rhodesia. Possible treaty duties not to recognize arising under Article 2 (5) of the Charter of the United Nations and under various resolutions of the United Nations, in particular S. Res. 277 (1970) are discussed. It is asserted that under the latter resolution there is a duty not to recognize Rhodesia. The scope and extent of that duty are considered. It is also argued that there is no duty not to recognize a state which is constitutionally based on the denial of the right of self-determination. Finally the validity of an act of recognition which contravenes a "duty not to recognize" is discussed and the submission is made that the act, though unlawful, can be valid.

The question whether recognition has been accorded to Rhodesia is next considered. In this context attention is drawn to the competing international law claims to complete sovereignty over Rhodesia - the Rhodesian claim and the British claim. The Rhodesian claim is not expressly recognized by any other state. Whether implied recognition of the Rhodesian claim can be inferred from various factors is next considered. These are the conduct of negotiations, maintenance of official, trade, consular and diplomatic relations, conclusion of bilateral treaties, United Nations action under both Chapters VI and VII of the Charter and United Kingdom invocation of United Nations assistance. The conclusion is expressed that there has been no implied recognition of Rhodesian claims to independence by any other state. It is then found that the competing British claim to exercise complete sovereignty over Rhodesia has been recognized by all states except South Africa.

The South African attitude is then analysed and a compromise solution is /

is offered in which it is submitted that South Africa still continues to recognize the status quo ante U.D.I.

Conclusions are then expressed on the extent of Rhodesian personality. These are based upon the views previously advocated on the constitutive nature of recognition and on the extent to which there can be said to be recognition of Rhodesia. Rhodesia is found to have a limited international personality in three spheres; in its relationship with South Africa; as a member of certain international organizations; in its relationship with member states of the Organization of American States.

The implications of limited Rhodesian personality are then discussed. In the limited spheres where its personality is operative, it is capable of having rights and duties. Outside these spheres, it has no rights and duties. Thus it may make no claims on other states but is in turn not subject to claims by other states. In the light of this, various allegations that Rhodesia has violated international law are examined and rejected.

Chapter IV is entitled "The Government of Rhodesia". It commences by distinguishing the concept of government from that of state, the former being merely an element of the latter. Rhodesia is found to have an effective government which is unconstitutional in origin. The question whether recognition is necessary to give international status to that effective government is then discussed and a preference for the Constitutive theory is also expressed here. Just as in the case of states a duty to recognize governments is rejected so that no state has a duty to recognize the Government of Rhodesia. Possible duties not to recognize a government are then discussed. The duty not to recognize a government prematurely is found to be inapplicable to the Government of Rhodesia /....

Rhodesia. The doctrine of legitimacy, the doctrine of subsequent legitimation and unwillingness to observe international law are all discussed and found not to impose a duty not to recognize a government. A treaty duty not to recognize the Government of Rhodesia is found to exist by virtue of S. Res. 277 (1970).

The extent of recognition which has been accorded to the Government of Rhodesia is next considered. This matter is simplified by the rule that non-recognition of state, of necessity involves non-recognition of government. Thus the Government of Rhodesia is only capable of being recognized in the three spheres in which the State of Rhodesia has a limited personality. These three spheres are then examined and the Government of Rhodesia is found only to have international status in one of these spheres, viz. the relationship with South Africa. The consequences both in international law and in municipal law of the limited status of the Rhodesian Government are then discussed in relation to the giving of cognizance to its acts in other states, its locus standi before the courts of other states, jurisdictional immunities and diplomatic immunities in other states, recovering property situated in other states, money-issuing capacity and postage stamp issuing capacity. The effect of S. Res. 277 (1970) on these matters and on the general question of giving effect to the legal system of Rhodesia in the courts of other states is also considered.

Finally the individual responsibility of the members of the Rhodesian Government is considered. Their conduct is found not to fall within any of the established categories of individual responsibility in international law.

Chapter V is entitled "The People of Rhodesia". It commences by discussing/.....

discussing the concept of "people" and the capacity of individuals to be the bearers of rights and duties in international law.

The question whether a right of self-determination exists is next considered and the question is answered in the negative. The view is also expressed that even if the right of self-determination did exist and inhere in the people of Rhodesia, it would not be available against Rhodesia but it might be available against the United Kingdom.

The question whether any human rights under international law inhere in the people of Rhodesia is next considered. The Universal Declaration of Human Rights, the Charter of the United Nations and the European Convention on Human Rights and Fundamental Freedoms are considered as possible sources of such rights but are rejected for differing reasons. It has been alleged that Rhodesia has violated traditional human rights such as would have justified humanitarian intervention. The traditional human rights in question are examined and found to be non-existent. An important matter which receives attention here is whether a customary norm of non-discrimination on the basis of race can be said to have evolved. An affirmative answer is given to this question but for reasons which concern its lack of international personality, the norm is found not to bind Rhodesia in its relationship with its own citizens.

The rights of para-military forces operating in Rhodesia against Rhodesian and South African forces is next discussed. The laws of war are found to be inapplicable to the contest in question. For various reasons, the rights bestowed by the Geneva Conventions, 1949 are also found to be inapplicable and the conclusion is expressed that the conflict in Rhodesia is not governed by

international /

international law.

The right to protect the people of Rhodesia diplomatically is next treated. The general rules of diplomatic protection and the role of recognition in relation to the same are discussed. It is found that Rhodesia may exercise a right of diplomatic protection against South Africa while the relevant right resides in the United Kingdom in relation to other states. Finally the rather complicated position in relation to protection in cases of dual and multiple nationality and the protection of corporations is outlined.

Chapter VI is entitled "The United Kingdom". The latter claims complete sovereignty over the territory of Rhodesia and claims to be its government. Hence, in considering the status of the territory, it is imperative to describe the special position of the United Kingdom in relation to it. However, this chapter deals only with the special position of the United Kingdom and embraces only those legal situations which are peculiar to the United Kingdom itself. The chapter does not deal with general legal situations which concern other states just as much as the United Kingdom. Thus obligations to participate in various United Nations sanctions directed against Rhodesia are not considered because in this respect the United Kingdom is in precisely the same position as other member states of the United Nations. Such obligations have nothing to do with the special relationship between the United Kingdom and the territory.

The very substantial degree of United Kingdom personality in relation to the territory flowing from near-universal recognition is first described. The consequences of this for other states are then outlined.

The /

The responsibility of the United Kingdom for acts committed in Rhodesia is next considered. The general principles of state responsibility are discussed. A distinction is drawn between responsibility for the acts of 'authorized' officials, i.e. those instructed by the United Kingdom to carry on functioning after U.D.I., and responsibility for acts of the 'rebel' officials in Rhodesia. United Kingdom responsibility in relation to negligence in preventing and suppressing the Rhodesian rebellion and negligence in protecting the rights of aliens in Rhodesia, responsibility for the omission of the Rhodesian Government to pay interest on Rhodesian loans, for acts of para-military forces and of South African forces operating in Rhodesia are all discussed. In most of these cases the United Kingdom is found to bear little or no responsibility.

The special competences of the United Kingdom in relation to Rhodesia are next considered. The United Kingdom may naturally take such measures as are objectively legal in international law. A variety of such measures have been taken and the principal examples here are grouped into a classification comprising economic, financial, political and constitutional measures. The United Kingdom may also take action against Rhodesia which is prima facie a breach of international law, because of lack of Rhodesian personality against it. Not only may the United Kingdom take action against Rhodesia but it also has some special competences to take action against third states which would normally be a breach of international law. The special competences have been conferred on it by resolutions of the Security Council of the United Nations. The United Kingdom has the competence to conduct the Beira "Blockade". The general characteristics and Charter basis

of this competence are discussed. The United Kingdom had the competence to detain the tanker Joanna V. It has the competence to rescind certain binding treaties relating to Rhodesia. Finally it has the competence to grant independence to Rhodesia.

The special obligations of the United Kingdom are next considered. Its obligations in relation to Rhodesian loans and public debt in its capacity as the recognized government of Rhodesia are examined and found to exist. Next its special obligations as a member state of the United Nations are considered. These include its obligations as an administering power under Articles 73(e) and 74 of the Charter of the United Nations, its obligation to end repressive measures in Rhodesia under S. Res. 253 (1968), its obligations to consider in good faith various recommendations made to it by organs of the United Nations and finally its obligations relating to the grant of independence to Rhodesia. In the latter connection several important obligations are examined in some detail. The customary norm of non-discrimination on racial grounds is found to be relevant. Thus the United Kingdom should ensure that the constitution of an independent Rhodesia granted by it should be in conformity with the norm. Independence on the basis of the 1965 Constitution, the 1969 Constitution, the Tiger Proposals, the Fearless Proposals and the Anglo-Rhodesian Proposals for a Settlement, 1971 is examined critically in the light of the norm of non-discrimination.

The obligation to develop self-government under Article 73 of Charter is also considered. The "six principles", insisted on by the United Kingdom in negotiations with Rhodesia, are construed as an attempt to grant a genuine self-government to Rhodesia which would be in accordance with the obligations of the United Kingdom under Article 73. Independence on the basis of the 1965

Constitution / ,...

Constitution, the 1969 Constitution, the Tiger Proposals, the Fearless Proposals and the Anglo-Rhodesian Proposals for a Settlement, 1971, is again examined critically, and in detail, in the light of each of the six principles individually.

Obligations incumbent on the United Kingdom in relation to a grant of independence to Rhodesia under binding United Nations resolutions are next considered and analysed. These are found to add somewhat to the obligations already subsisting under the norm of non-discrimination and Article 73 of the Charter.

Whether the United Kingdom can be expected to use force in implementing its obligations under these resolutions is also discussed and the question answered in the negative.

The question of the effect of the impossibility of fulfilling the above obligations is then considered. A distinction is drawn between the possibility of granting an "appropriate" independence to Rhodesia, on the one hand, and the possibility of denying an "inappropriate" independence to Rhodesia on the other hand. The latter, from its very nature, is found to be possible while the former is, for the moment at any rate, impossible for the United Kingdom. Because of this, it is submitted that relative impossibility temporarily suspends United Kingdom obligations here.

Obligations which the United Kingdom may possibly owe as a member state of the British Commonwealth of Nations are next examined. The various undertakings given by the United Kingdom in the Commonwealth context are described. The inter se doctrine is discussed and the conclusion is preferred that none of these undertakings embody international obligations for the United Kingdom.

The last subject discussed in the the thesis is the effect of a hypothetical grant of independence by the United Kingdom to Rhodesia. The effect of this on the international personality of Rhodesia and the obligations and international responsibility of the United Kingdom in respect of the territory are outlined. The question of state succession to treaties by Rhodesia on such a grant is considered. The general rules of state succession are discussed, and the possibility of the doctrine of reversion to sovereignty applying in the case of Rhodesia is considered and rejected. Finally the question of the continuance of United Nations sanctions in the event of a grant of independence to Rhodesia is discussed. In this regard the rebus sic stantibus doctrine is considered and the answer to the question is found to depend on whether the independence granted is an "appropriate" independence, i.e. one which is in accordance with the international law obligations of the United Kingdom, or an "inappropriate" independence, i.e. one which contravenes the international law obligations of the United Kingdom.

In compiling the bibliography, I have omitted references to standard general work on public international law as these would, in any event, be consulted in a work of this nature. The bibliography consists of a select academic reading list containing monographs and articles appearing in Journals.

Finally my opinions on the various problems encountered are stated in the light of materials available to me on 31st March, 1973.

LIST OF ABBREVIATIONS

A.J.I.L.	American Journal of International Law
Akehurst	Michael Akehurst, <u>A Modern Introduction to International Law</u> , London, 1970.
Ann. Dig.	Annual Digest of Public International Law Cases.
A. Res.	Resolution of the General Assembly of the United Nations.
Brierly	J.L. Brierly, <u>The Law of Nations</u> , 6th Ed. Oxford, 1963.
Brownlie	I. Brownlie, <u>Principles of Public International Law</u> , Oxford, 1966.
B.Y.I.L.	British Yearbook of International Law.
Castel	J.G. Castel, <u>International Law Chiefly as Interpreted and Applied in Canada</u> , Toronto, 1965
Chayes	A. Chayes, T. Ehrlich and A.F. Lowenfeld, <u>International Legal Process</u> , New York, 1969.
Chen	Ti - Chiang Chen, <u>The International Law of Recognition</u> , London, 1951.
C.I.L.S.A.	Comparative and International Law Journal of Southern Africa.
C.L.P.	Current Legal Problems.
F.A.O.	Food and Agriculture Organization.
G.A.T.T.	General Agreement on Tariffs and Trade.
Grotius	H. Grotius, <u>De Jure belli ac pacis</u> , Libri Tres
H.C.R.	Hague Court Reports
H.R.	Académie de droit international. Recueil des cours (The Hague).
I.B.R.D.	International Bank for Reconstruction and Development.
I.C.J.	International Court of Justice.
I.C.L.Q.	International and Comparative Law Quarterly.
I.L.M.	International Legal Materials.
I.L.R.	International Law Reports
I.M.F.	International Monetary Fund

I.T.U.	International Telecommunication Union.
Lauterpacht	H. Lauterpacht, <u>Recognition in International Law</u> , Cambridge, 1947.
Le Normand	René Le Normand, <u>La Reconnaissance et ses diverses applications</u> , Paris, 1899.
Lindley	M.F. Lindley, <u>The Acquisition and Government of Backward Territory in International Law</u> , London, 1926.
M.L.R.	Modern Law Review.
Molteno	D.B. Molteno "The Rhodesian Crisis and the Courts" (2) <u>C.I.L.S.A.</u> , 1969 pp. 254-289, 404-443 and (3) <u>C.I.L.S.A.</u> , 1970 pp. 18-48.
O'Connell	D.P. O'Connell, <u>International Law</u> , 2nd Ed. London, 1970.
Oppenheim	L. Oppenheim, <u>International Law</u> , 7th Ed. London, 1948.
Palley	Claire Palley, <u>The Constitutional History and Law of Southern Rhodesia</u> , Oxford, 1965
P.C.I.J.	Permanent Court of International Justice
Peaslee	A.J. Peaslee, <u>International Governmental Organizations, Constitutional Documents</u> , The Hague, 1961
Proceedings A.S.I.L.	Proceedings of the American Society of International Law.
Rhodesia L.J.	Rhodesia Law Journal.
R.I.A.A.	United Nations, Reports of International Arbitral Awards
S.A.L.J.	South African Law Journal
Schwarzenberger	Georg Schwarzenberger, <u>International Law</u> , 3rd Ed., London, 1957.
Schwarzenberger, Manual	G. Schwarzenberger, <u>A Manual of International Law</u> , 5th Ed., London, 1967
Sorensen	<u>Manual of Public International Law</u> , Edited by Max Sorensen, London, 1968.
S. Res.	Resolution of the Security Council of the United Nations
Starke	J.G. Starke, <u>An Introduction to International Law</u> , 7th Ed., London, 1972.
T.H.R.-H.R.	Tydskrif vir Hedendaagse Romeins-Hollandse Reg.

U.D.I.	Unilateral Declaration of Independence.
U.P.U.	Universal Postal Union
Vattel	Emerich de Vattel, <u>Le Droit de Gens</u> .
Whiteman	Marjorie M. Whiteman, <u>Digest of International Law</u> , Washington.
W.H.O.	World Health Organization.
W.M.O.	World Meteorological Organization.

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PART I

HISTORICAL SUMMARY

CHAPTER I

SUMMARY OF THE CONSTITUTIONAL POSITION OF SOUTHERN RHODESIA UP
TO 11TH NOVEMBER, 1965

SECTION I

INTRODUCTION

In this introductory section the constitutional development of Southern Rhodesia up to 11th November, 1965, is outlined. More details of such development are furnished in the remaining sections of the Chapter. In the second section, the development of the constitution of the Protectorate of Southern Rhodesia is described. The third section portrays the history of constitutional development in the Colony of Southern Rhodesia and pays attention, where necessary, to the effect of the creation and dissolution of the Federation of Rhodesia and Nyasaland on this. This is followed in the fourth section by a review of the negotiations between the Southern Rhodesian and United Kingdom authorities concerning the grant of independence to Southern Rhodesia. It is hoped that the review will isolate the issues which lay between Southern Rhodesia and the United Kingdom, most of which turned out to be obstacles in the path of a grant of independence to Southern Rhodesia.

It must be stressed, however, that this Chapter is merely of an introductory nature. Its main purpose is to provide background material for the discussion of problems relating to the status of Rhodesia in the post-U.D.I. era. It does not attempt to be a detailed exposition of the constitutional law of Southern Rhodesia in the pre-U.D.I. era.

In/...

In 1889 the British South Africa Company was chartered.¹⁾ It exercised a form of administration in Mashonaland for a year.²⁾ This administration had, however, no constitutional basis because in terms of the Charter of the Company, it only obtained permission to exercise such governmental powers as it might acquire by concession, grant, agreement or treaty subject to the approval of the Secretary of State.³⁾ These powers had not been so acquired.

In 1891 an Order in Council was promulgated in terms of which the territory was to be a British protectorate.⁴⁾ This vested general powers of administration and legislation in the High Commissioner for South Africa.⁵⁾ Such administration as Lobengula acquiesced in was not, however, performed by the High Commissioner but by the British South Africa Company under permission from the Crown⁶⁾ and subject to a measure of supervision by the High Commissioner.⁷⁾

In/...

- 1) For text of Charter see C.5918, No. 128, Encl., pp.227-232.
- 2) Palley, pp. 40-41.
- 3) Charter of the Company, Art. 2. See Palley, pp. 34-36; Foreign Jurisdiction Act (53 & 54 Vict. C.37).
- 4) South Africa Order in Council, 9th May, 1891. Strictly speaking a protectorate is not a British possession but foreign territory. See J.E.S. Fawcett, "Treaty Relations of British Overseas Territories", (26) B.Y.I.L., 1949, p.86 at p.88. See too Foreign Jurisdiction Act (53 & 54 Vict. C.37).
- 5) Order in Council, note 4) supra, S.2.
- 6) Order in Council, note 4) supra, S.8.
- 7) Order in Council, note 4) supra, S.4. See Palley, pp.90-94 who shows that in fact the High Commissioner proposed virtually to take over the government of the country but that the Colonial Office was not agreeable and ordered him only to exercise his legislative and administrative powers in exceptional cases. Georges Fischer, "Le Probleme Rhodesien", (11) Annuaire Francais de Droit International, 1965, p.41 says that: "ce regime represente une survivance tardive d'une methode d'administration coloniale disparue bien plus tôt partout ailleurs."

In 1893-94 Company forces overcame Lobengula and by this conquest the Crown acquired jurisdiction over Southern Rhodesia.⁸⁾ Jurisdiction may be acquired over a protectorate by conquest coupled with an omission to annex the territory.⁹⁾ On 18th July, 1894 an Order in Council was promulgated providing for the administration of the territory.¹⁰⁾ The Protectorate so established continued till 1923 when by Order in Council Southern Rhodesia was annexed.¹¹⁾ Letters Patent issued in the same year provided a constitution establishing responsible government.¹²⁾ Thus from 1923 to 1965 Southern Rhodesia was a self-governing British Colony.¹³⁾ It is now necessary to outline briefly the constitutional structures of the Protectorate of Southern Rhodesia and the Colony of Southern Rhodesia respectively.

Section II/...

- 8) In re Southern Rhodesia [1919] A.C. 211 at 221; Palley, p. 110. Sir Arnold McNair K.C., "Aspects of State Sovereignty" (26) B.Y.I.L., 1949, p.6 at p.30.
- 9) Palley, pp. 110-111; Abeysekera v. Jayatilake [1932] A.C. 260 at 264.
- 10) Matabeleland Order in Council, 18th July, 1894. Palley, p.114 points out that despite its misleading title it was to apply to all territories which were to comprise the future Southern Rhodesia.
- 11) Southern Rhodesia (Annexation) Order in Council, 1923, 30th July, 1923.
- 12) Letters Patent, 1st September, 1923.
- 13) Palley, p.215 points out that it is a myth that Southern Rhodesia enjoyed full self-government for a period of some forty years, that at first it enjoyed partial self-government and that even as late as 1959 it was described as being not fully self-governing.

SECTION II

CONSTITUTIONAL STRUCTURE OF THE PROTECTORATE.

In a British protectorate the control of external affairs is vested in the Parent State but the latter may also have varying degrees of control in relation to the internal affairs of the protectorate.¹⁾

In fact the Crown is deemed to have absolute powers over such a protectorate because strictly speaking the protectorate is foreign territory.²⁾

The acts of the Crown, whether by way of legislation or administration, are regarded as being performed against foreigners abroad. Such acts are therefore acts of State and are not challengeable in the courts.³⁾

It is possible, of course, for these powers of the Crown, derived from prerogative to be restricted or regulated by Act of Parliament.⁴⁾ It is also possible for such powers to be extended by Act of Parliament.⁵⁾

Under the Order in Council of 1894 the legislative power was vested in the Board of Directors of the Company.⁶⁾ Enactments, however, would/...

- 1) Sobhuza II v. Miller [1926] A.C. 518 at 522-523.
- 2) R. v. Crewe : Ex Parte Sekgome [1910] 2 K.B. 576 at 611; Palley, p. 45.
- 3) R. v. Crewe: Ex parte Sekgome [1910] 2 K.B. 576 at 606, 628; Sobhuza II v. Miller [1926] A.C. 518 at 525; Palley, pp. 61-62.
- 4) Foreign Jurisdiction Act (53 and 54 Vict., C. 37) S.1; Nyali Ltd. v. Attorney-General [1956] 1. Q.B.1 at 14; Attorney-General v. de Keyser's Royal Hotel Ltd. [1920] A.C. 508, at 539, 554, 561; Sabally and N'jie v. H.M. Attorney-General [1964] 3 W.L.R. 732 at 749; Palley, pp. 62-63.
- 5) Foreign Jurisdiction Act (53 and 54 Vict., C.37) S.2.
- 6) S.17.

would be void if repugnant to an Order in Council or to a proclamation issued by the High Commissioner for South Africa.⁷⁾

An Order in Council of 1898 transferred legislative power to a legislative Council.⁸⁾ This was composed of elected members and members nominated by the Company, the latter being in the majority.⁹⁾ The 1898 Order also provided that the High Commissioner would have the power to alter the proportion of elected to nominated members in favour of the former.¹⁰⁾ In 1903 equality as between elected and nominated members was introduced.¹¹⁾ In 1911 an Order in Council provided for a majority of elected members.¹²⁾ The power under the 1898 Order was exercised and the number of elected members was increased by further Orders in Council in 1913 and 1914.¹³⁾ There were of course restrictions on the Council's power to legislate. Enactments repugnant to an Order in Council were void and certain other specified types of enactments were void unless the prior consent of the Secretary of State was obtained.¹⁴⁾

As/...

- 7) S.20. For details of further controls on such legislation see Palley, pp. 114-115.
- 8) Southern Rhodesia Order in Council, 1898. See Palley, p.133; R. v. McChlery, 1912 A.D. 196 at 219-220.
- 9) Palley, pp. 133, 196-197.
- 10) S.17 (A) (11).
- 11) Southern Rhodesia Order in Council, 16th February, 1903; Palley, p.197.
- 12) Southern Rhodesia Order in Council, 4th May, 1911, S.3; Molteno, p.259.
- 13) High Commissioner's Proclamation 17 of 23rd August, 1913; Proclamation 47 of 31st July, 1914. See Palley, pp.202-203.
- 14) S. 47,49,81. For full details of restriction on the legislative power see Palley, pp. 133-134, 156-172.

As far as administration was concerned the Order in Council of 1894 provided that it should be vested in an administrator and a Council consisting of four persons appointed by the Company subject to the approval of the Secretary of State.¹⁵⁾ Under the Order in Council of 1898 this body became the Executive Council and further minor changes were made.¹⁶⁾

The 1894 Order in Council established a High Court. Judicial appointment was by the Company subject to the approval of the Secretary of State. Until 1910 appeals lay to the Cape Supreme Court. From 1910-1923 appeals lay to the Appellate Division of the Supreme Court of South Africa with a further appeal to the Privy Council.¹⁷⁾

The 1898 Order in Council also provided for franchise qualifications for elections to the Legislative Council. It provided that the High Commissioner could determine these by Proclamation. He prescribed the franchise qualifications then in force in the Cape Colony.¹⁸⁾

In the case In re Southern Rhodesia¹⁹⁾ it was held that unallotted lands in the Protectorate were vested in the Crown and not in the Company. This eventually led to the demise of the Protectorate and the annexation of the territory as the Company was then unwilling to continue to have responsibilities relating to the territory.²⁰⁾

SECTION III/...

15) S.8, 14; Palley, pp.116-117.

16) S.13(1); Palley, p.133.

17) S.49 to 78; Palley, p.152.

18) High Commissioner's Proclamation 17 of 25th November, 1898.
S. 3,4.5; Palley, pp. 133, 135-136.

19) [1919] A.C. 211.

20) Palley, pp. 206-207.

SECTION III

CONSTITUTIONAL STRUCTURE OF THE COLONY.

As we have seen the Colony was created by annexation in terms of an Order in Council in 1923.¹⁾ A constitution was provided in the same year by Letters Patent.²⁾ In the period under examination the constitutional structure of the Colony was somewhat complicated by the creation of the Federation of Rhodesia and Nyasaland in 1953,³⁾ its dissolution in 1963⁴⁾ and the introduction of a new constitution for Southern Rhodesia in 1961.⁵⁾ In considering the constitutional structure the legislature, executive and judiciary will be treated separately. The franchise and human rights provisions will then be described.

(1) The Legislative Power.

This power was exercised by the Crown and an elected Legislative Assembly.⁶⁾ But the legislative power⁷⁾ was subject to several limitations which were as follows:

- (a) The Colonial Laws Validity Act, 1865, S.2 applied and this prohibited the legislature from passing laws with extra-territorial effect.⁸⁾

(b)/...

-
- 1) Southern Rhodesia (Annexation) Order in Council, 1923, 30th July, 1923.
 - 2) Letters Patent, 1st September, 1923.
 - 3) Rhodesia and Nyasaland (Federation) Act, 1953, 1 & 2. Eliz.II, C.30; Rhodesia and Nyasaland Order in Council, 1953, S.1. 1953, No.1200.
 - 4) Rhodesia and Nyasaland Act, 1963 11 & 12 Eliz. II C.34; Federation of Rhodesia and Nyasaland Order in Council, S.1. 1963 No. 1635; Federation of Rhodesia and Nyasaland (Dissolution) Order in Council, S.1. 1963 No. 2085.
 - 5) Southern Rhodesia (Constitution) Order in Council, S.1. 1961, No. 2314.
 - 6) On the composition of the legislature see Palley, pp. 217-218.
 - 7) Contained in S.26(1) of the Letters Patent, 1923.
 - 8) Palley, p.220.

- (b) The Crown retained the power to reserve bills, disallow bills and to instruct the Governor to withhold assent to bills or to reserve bills.⁹⁾
- (c) Certain bills had to be reserved by the Government,¹⁰⁾ one of the principal examples being the requirement of reservation in relation to certain bills discriminating against Africans.¹¹⁾
- (d) Certain sections of the Constitution could not be amended by the Legislature but only by the Crown or the United Kingdom Parliament. Two of the main examples here were the provisions defining the legislative power and the section containing the prohibitions.¹²⁾
- (e) The remainder of the Constitution could only be amended by two thirds of the members of the Legislative Assembly.¹³⁾
- (f) Certain matters relating to Native Affairs were vested in the High Commissioner for South Africa.¹⁴⁾

These then were the initial legislative powers of the Colony in 1923 and the limitations thereon. Changes in these powers over the years will now be described.

In/...

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- 9) S.31; Palley, pp.216, 226-227; Chayes, II p. 1319. The power of disallowance has never in fact been used. Ibid., p.1326.
 - 10) S.28; Palley, pp. 225, 236.
 - 11) S.28; Chayes, II, p. 1319. For a full analysis of these provisions see Palley, Chapter 12.
 - 12) S.26(2); Chayes, II, p. 1319. Other like prohibitions are contained in S.25(1), 28, 39-47, 54(1), 55, 56, 57(1)(2). See Palley, pp. 220-221.
 - 13) S.26(2).
 - 14) S.39-47.

In 1930 a further compulsory reservation in relation to bills providing for exclusive African or European land tenure was introduced by Letters Patent amending the Constitution.¹⁵⁾

In 1937 the control of the High Commissioner for South Africa over certain aspects of Native administration terminated.¹⁶⁾

In 1953, as we have seen, the Federation of Rhodesia and Nyasaland was formed and the Federal Constitution was embodied in an Order in Council of that year.¹⁷⁾ The Federal Legislature was given exclusive powers to legislate on certain matters¹⁸⁾ but until the Governor-General published a notice to this effect in relation to a particular subject, the individual territorial legislatures were to continue to be competent to legislate.¹⁹⁾ Notices were in fact published only in relation to external affairs, customs and excise and income tax.²⁰⁾ It is therefore only in these particular fields that the Legislative Assembly of Southern Rhodesia lost its powers to legislate as a result of federation. It may be added that in certain fields both the Federal and the Territorial Legislatures were competent to legislate.²¹⁾ The residue of legislative powers remained with the Territorial Legislature, in the case of Southern Rhodesia subject to the limitations which we have already described.

In/...

15) Letters Patent, 26th March, 1930; Palley, p.266.

16) Letters Patent, 25th March, 1937; Palley, p.294.

17) Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953 S.I. 1953, No. 1199.

18) Second Schedule, Part I of the Constitution.

19) Art. 29(2) of the Constitution.

20) S.R.G.N. 903/53, 345/61.

21) Second Schedule, Part II of the Constitution.

In 1961 the Southern Rhodesia (Constitution) Act, 1961²²⁾ authorized the Crown to repeal the Constitution granted by the Letters Patent of 1923 and to grant a new Constitution to the Colony by Order in Council. These aims were achieved by the Southern Rhodesia (Constitution) Order in Council, 1961.²³⁾ Under this new Constitution the legislative power was vested in the Queen and a Legislative Assembly of 65 members.²⁴⁾ This Legislature was authorized to make laws which might operate extra-territorially.²⁵⁾ It is now merely necessary to describe the limitations which existed on the right of the Legislative Assembly to pass laws.²⁶⁾

(a) The United Kingdom Parliament retained an inherent power to legislate for the Colony.²⁷⁾ However, there was a constitutional convention that it would only do so on matters

within/...

22) 10 Eliz. II, C. 2; Palley, p. 318.

23) S.I. 1961, No. 2314.

24) S.20(1).

25) S.20(2); Molteno, p.260.

26) For a concise summary of these see Molteno, p.260.

27) R. v. McChlery, 1912 A.D. 199. See too S. 111 proviso; Palley, p.702; Molteno, p.261; Madzimbamuto v. Lardner Burke N.O., 1968 (3) All E.R. 561 (P.C.) at 572; J.M. Eekelaar "Splitting the Grundnorm" (30) M.L.R., 1967, p.156 at p.157; B.A. Hepple, P. O'Higgins & C.C. Turpin "Rhodesian Crisis - Criminal Liability", 1966, Criminal Law Review, p.5 at p.9.

(a) continued:

within the competence of the Southern Rhodesian Legislature
with the agreement of the Southern Rhodesian Government.²⁸⁾

(b)/...

- 28) Cmd. 1399, p.3; Palley, p.103; Molteno, p.261. According to Eekelaar, note 27) supra, p. 157 and de Smith, The New Commonwealth and its Constitutions, London, 1964 quoted by G.N.Barrie, "Rhodesian U.D.I. - an unruly horse" (1) C.I.L.S.A., 1968 p.110 at pp. 110-111 the Government of the United Kingdom publicly recognized the existence of a convention that Parliament could not legislate on any matter within the competence of the Southern Rhodesian Legislature and could not amend the Constitution without the consent of the Southern Rhodesian Government. Chayes, II, p. 1327 says that the convention was of such strength that by virtue of it the British Government could not resume its former powers in Southern Rhodesia. Eekelaar, note 27) supra, pp.157-158 discusses the great extensiveness of the convention. But in strict theory the convention had no legal effect in limiting the legal powers of the United Kingdom Parliament. Madzimbamuto's case, note 27) supra, at 572; McChalery's case, note 27) supra, at 218. For the convention cannot have had the effect of dividing municipal law sovereignty between Parliament and the Colonial Legislature. Campbell v. Hall, 1558-1774 All E.R., 252 at 257 quoted by Molteno, p.280. Molteno, pp. 282-283 also points out that the 1961 Constitution left the Colonial Laws Validity Act applicable without qualification to Rhodesia which would be inconsistent with a division of Municipal law sovereignty. See too Molteno, p.285. J.E.S. Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965/66, p.103 points out at pp. 104-5 that in a joint declaration of 27th April, 1957 the British and Federal Governments recognized that the convention was applicable to the Federation of Rhodesia and Nyasaland. This was the position of Southern Rhodesia prior to Federation too but it is not clear whether the principle emerged in 1923 or at an intermediate time. In 1963 Britain affirmed the convention before the Security Council. The convention can hardly have applied to legislation which was designed to alter the structure of the Colony itself but only to ordinary internal legislation. Thus the British dissolved the Federation in the face of strenuous opposition from the Federal Government.

By way of comment on these views expressed by J.E.S. Fawcett, the convention in question was in essence that the Government of the United Kingdom should not propose legislation falling within the powers of a self-governing colonial legislature. This convention pre-dated 1923. Thus when Southern Rhodesia became a self-governing colony in 1923, the convention applied to it. The words underlined above would seem to dispose of any objections to United Kingdom legislation dissolving the Federation. In any event from the time of the establishment of the Federation, the United Kingdom Government expressly reserved the right to review the Federal experience after the lapse of ten years.

- (b) The power of disallowance could be exercised in relation to legislation which the United Kingdom Government regarded as being contrary to a treaty obligation which it had contracted in relation to the Colony. It could also be exercised in relation to certain legislation dealing with the rights of holders of Colonial Stock.²⁹⁾ Otherwise the power of disallowance disappeared.
- (c) The power of reservation applied to legislation introduced to amend certain parts of the constitution. The amendment of these particular parts of the Constitution was reserved to the Crown.³⁰⁾ Otherwise the power of reservation disappeared.³¹⁾
- (d) Certain other parts of the Constitution were specially entrenched.³²⁾ These could only be amended in one or other of two ways: (i) by the Legislature with a two-thirds majority and the approval of a majority of each of the four racial groups in a separate referendum for each group; (ii) by the Legislature with a two-thirds majority, the relevant bill obtaining the assent of Her Majesty acting on the advice of the United Kingdom ministers.³³⁾

(e)/...

29) S.32(1); Palley, pp. 716-717; Molteno, pp.263-264.

30) S.30(1), 105, 111; The particular sections are S.1-6, 29, 32, 42, 49, 105, 111; Palley, pp.432-433; Molteno, p.263.

31) S.32(1); Palley, p.717; Eekelaar, note 27) supra, p.157.

32) These are the matters enumerated in the Third Schedule; Palley, p. 435.

33) S.107-110; Palley, p.435; Molteno, p. 262.

- (e) The remaining parts of the Constitution could only be amended by the Legislature with a two-thirds majority.³⁴⁾
- (f) The exercise of the Governor's powers were subject to Royal Instructions.³⁵⁾ However, convention excluded interference in this way.³⁶⁾
- (g) As before 1961 the spheres of exclusive federal competence would have been outside the legislative competence of the Southern Rhodesian Legislature, viz. external affairs, customs and excise and income tax.³⁷⁾

Finally, with the dissolution of Federation in 1963 under the Rhodesia and Nyasaland Act, 1963, the latter restriction was removed as the legislative powers of the Federation were distributed among the territories.³⁸⁾

(2) The Executive Power.

Under Letters Patent the executive power was vested in the Governor and an Executive Council which was appointed by him. The Constitution provided for the appointment of Ministers by the Governor.³⁹⁾ The Governor acted on the usual advices except where otherwise provided.⁴⁰⁾

Under/...

- 34) S.106; Palley, p.436; Molteno, p.262. The Constitution then could only be changed in accordance with the manner and form laid down therein. Attorney-General for New South Wales v. Tretrowan [1932] A.C. 526 quoted by Eekelaar, note 27) supra, at p.157.
- 35) S.2; Palley, p.719.
- 36) See Palley, pp. 720-721 for the circumstances in which instructions might be issued in practice.
- 37) Palley, p.433; S.117(1).
- 38) For a contrary view see Palley, pp. 433, 695.
- 39) Palley, p. 274.
- 40) Palley, pp. 274-276.

Under the Constitution of the Federation of Rhodesia and Nyasaland the Executive power of the Federation was exercised by the Governor-General on behalf of the Crown acting on the advice of the Federal Ministers or Federal Executive Council.⁴¹⁾ The Executive power was subject to the following limitations. (i) The exercise of the power of the Governor-General was subject to Royal Instructions as to assent, withholding of assent and reservation.⁴²⁾ (ii) The Executive power only related to the subjects in respect of which the Federal Legislature was competent.⁴³⁾ Further, in relation to Southern Rhodesia, the fields of exclusive Federal competence would have been removed from the ambit of the executive authority of Southern Rhodesia.

Under the 1961 Constitution executive power was vested in the Governor acting on behalf of the Queen,⁴⁴⁾ and on the advice of the Prime Minister or Executive Council, as the case might be, except where the constitution otherwise provided.⁴⁵⁾

Finally, with the dissolution of Federation in 1963, the executive powers of the Federation were again distributed among the territories.⁴⁶⁾

(3)/...

41) Palley, pp. 353, 355.

42) Palley, p.353.

43) Palley, p.346. There was, however, a provision exhorting consultation on matters of common interest and concern - Art.41(2). For a discussion of the operation of this arrangement in practice see Palley, pp. 357-360.

44) 1961 Constitution, S.42; Palley, p.453.

45) Palley, p. 454.

46) Palley, p. 680.

(3) The Judiciary.

The High Court which existed before 1923 continued to exist. As before 1923 appeals were to the Appellate Division of the Supreme Court of South Africa with a further appeal to the Privy Council.⁴⁷⁾ This position continued until 1955.⁴⁸⁾ From 1955 to 1963 appeal lay to the Supreme Court of the Federation of Rhodesia and Nyasaland⁴⁹⁾ with further appeal to the Privy Council.⁵⁰⁾ The Supreme Court of the Federation also possessed some original jurisdiction.⁵¹⁾

As from 1961 the constitution and jurisdiction of the High Court of Southern Rhodesia was provided for by the 1961 Constitution.⁵²⁾

Finally, on dissolution of the Federation, a Constitutional amendment was enacted providing for a new appeal tribunal to replace the Supreme Court of the Federation. The High Court was divided into two divisions: (1) A General Division. This succeeded to the jurisdiction of the High Court as formerly constituted;

(11)/...

47) Palley, p.329.

48) Palley, p.400. By Act No. 33 of 1938, a Rhodesian Court of Appeal was created to hear criminal appeals. See Palley, p.329.

49) Constitution of the Federation of Rhodesia and Nyasaland, 1953, Arts. 55, 62; Federal Supreme Court Act No. 11 of 1955; Palley, pp. 400-401.

50) Palley, p.402.

51) Constitution of the Federation of Rhodesia and Nyasaland 1953, Articles 53, 54; Palley, pp. 401-402.

52) Palley, p. 521.

(ii) An Appellate Division. This was primarily to hear appeals from the General Division.⁵³⁾ A further appeal lay to the Privy Council.⁵⁴⁾

(4) Human Rights

Certain human rights were embodied in a Declaration of Rights in the 1961 Constitution.⁵⁵⁾ These provisions were specially entrenched and could only be altered in the manner already described.⁵⁶⁾

Legislation alleged to infringe these rights was subject to judicial review.⁵⁷⁾ A Constitutional Council was also established which had certain functions in relation to the observance of the Declaration of Rights.⁵⁸⁾

The human rights specifically entrenched in the Declaration were, however, subject to a number of qualifications.⁵⁹⁾

(5)/...

53) Palley, p.522.

54) There was an appeal of right in relation to a claim by any person that the provisions of the Declaration of Rights contained in the Southern Rhodesia Constitution 1961 had been contravened in relation to him. Constitution Amendment Act, No. 13 of 1964, S.8; Palley, p.403. There was a similar right of appeal between 1961 and 1964 from the Federal Supreme Court on appeal from the High Court of Southern Rhodesia. Southern Rhodesia Constitution, 1961, S. 71; Federal Supreme Court (Amendment) Act, No. 46 of 1962; Palley, p.403.

55) Palley, p.573.

56) Supra, p.12.

57) Constitution of Southern Rhodesia 1961, S.71, 115; Palley, p.573.

58) Palley, pp. 436-437. For a detailed exposition of the Council's functions see Palley, pp. 443-452.

59) For details see Palley, pp. 577-585. In fact Palley regards the right that no criminal offences be retrospectively created and that no penalty more severe than that competent at the time when the offence was committed be imposed as the only examples of "absolute" rights in the Declaration (p.577).

(5) The Franchise.

The original Legislative Assembly in the Colony was elected by the same franchise as that pertaining in the Protectorate.⁶⁰⁾ The 1961 Constitution provided for a Legislative Assembly of 65 members.⁶¹⁾ This was to be elected by voters on two voters' rolls, viz. an "A" roll and a "B" roll.⁶²⁾ There were franchise qualifications for enrolment as a voter on either roll but the qualifications for enrolment on the "A" roll were more stringent.⁶³⁾ The country was divided into fifty single member constituencies and also into fifteen single member electoral districts.⁶⁴⁾

In elections in the former constituencies the total "B" roll votes cast could not be treated as exceeding one quarter of the total number of "A" votes cast. In the latter constituencies the reverse was the position.⁶⁵⁾

The franchise qualifications were specially entrenched in the 1961 Constitution in that amendments raising these qualifications could only be enacted in the manner already described.⁶⁶⁾

It/...

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- 60) The qualifications are contained in the Voters' Qualification and Registration Amendment Ordinance, No. 14 of 1912 and the Women's Enfranchisement Ordinance, No. 9 of 1919. Palley, p.203. Some changes were introduced in a series of Electoral Acts and Amendment Acts from 1928 to 1957. For details see Palley, pp. 217, 308-312.
- 61) S.7, 37; Palley, p.414.
- 62) Electoral Amendment Act, No. 62 of 1961. Palley, p.416.
- 63) For details see Palley, pp. 418-419. Electoral Amendment Act, No. 62 of 1961 S.8-11, 15.
- 64) Constitution of Southern Rhodesia 1961, S.7, 37; Palley, pp. 414-415.
- 65) Palley, p.415; Electoral Act, Chapter 2, S.81(2).
- 66) Supra, p.12.

It will be seen from the above that there were two types of limitation on Southern Rhodesian competences before 11th November, 1965. (1) There were certain constitutional restrictions and restrictions relating to the protection of the people of Rhodesia which were not concerned with the competences of the United Kingdom as such. This type of restriction in no way derogates from the independence of a state. In the United States of America we find such "internal" constitutional limitations.⁶⁷⁾ (ii) There were restrictions on competences which were aimed at preserving the competences of the United Kingdom in relation to Southern Rhodesia. This species of restriction does mean that the entity which is so restricted is not independent because it is in certain ways subject to the control of another State. In the case of Southern Rhodesia the following restrictions existed as we have seen.

The power of disallowance existed in an extremely limited field and the amendment of particular parts of the Constitution was reserved to the Crown.⁶⁸⁾ Molteno considers these restrictions as being of a formal nature and not detracting greatly from independence.⁶⁹⁾ In addition to these restrictions there was the inherent right of the United Kingdom Parliament to legislate for Southern Rhodesia, and the fact that the exercise of the Governor's powers were subject to Royal instructions. However, in both of

these/...

67) Molteno, p.260.

68) Supra, p.12.

69) Pp. 260-261. Eekelaar, note 27 supra, p. 157 considers that the 1961 Constitution gave Southern Rhodesia almost complete autonomy over her internal affairs.

these cases Convention precluded unilateral interference by the United Kingdom in Southern Rhodesian affairs. Because of this Molteno concludes that these restrictions were not real restrictions on Southern Rhodesian independence.⁷⁰⁾

In fact, therefore, Southern Rhodesia was all but independent before 11th November, 1965. Despite this the Southern Rhodesian Government wished to secure formal independence from Britain. The pressure for independence was no doubt to a considerable extent due to the fact that the other two ex-members of the Federation, Northern Rhodesia and Nyasaland were granted independence by Britain in 1964 as Zambia and Malawi respectively. For the purposes of securing independence negotiations between the authorities in Southern Rhodesia and Britain commenced. These were fated to be fruitless and they culminated in the Unilateral Declaration of Independence by Southern Rhodesia on 11th November, 1965. A brief resume of the negotiations will now be given.

SECTION IV/...

- 70) P.261. Hepple, Higgins and Turpin, note 27 supra, p.9 say that the only limitations on Southern Rhodesia prior to U.D.I. were (a) the Legislature could not legislate repugnantly to United Kingdom Acts of Parliament (b) only the United Kingdom Parliament could grant sovereign independence to Rhodesia (c) Southern Rhodesia was not recognized by the international community as a sovereign state for international law purposes and the United Kingdom Government has retained ultimate responsibility for its external relations - a constitutional position not significantly different from the position in 1918 of those self-governing territories which were later to become the independent Dominions.

SECTION IV

INDEPENDENCE NEGOTIATIONS 1963-1965.¹⁾

(1) Requests for Independence.

In a letter dated 27th November, 1963 from the Prime Minister of Rhodesia, Mr. Winston Field, to the Secretary of State for Commonwealth Relations regret is expressed that the independence question had not been advanced. The matter was regarded as one of urgency and importance in view of the fact that Nyasaland's right to independence had been acknowledged. A precedent had thus been created for treating Northern Rhodesia in the same manner but an opposite attitude had been adopted in relation to Southern Rhodesia's request for independence. In the result Southern Rhodesia had been placed in an almost impossible position.²⁾

In a letter dated 3rd March, 1964, from the Prime Minister of Southern Rhodesia to the Secretary of State the issue is stated to be, not the impact on the Commonwealth which the grant of independence is likely to have, but the preservation of the Southern Rhodesia Constitution against international and Commonwealth forces to circumvent and suppress it.³⁾

Demands for full independence continued to be pressed, e.g. in a letter dated 13th January, 1965 the Prime Minister of Southern

Rhodesia/...

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- 1) The source of the information contained in this resume is Cmd. 2807 - Southern Rhodesia - Documents relating to the negotiations between the United Kingdom and Southern Rhodesian Governments, November 1963 - November 1965.
 - 2) Cmd. 2807, pp. 5-6.
 - 3) Ibid., p.13.

Rhodesia, Mr. Ian Smith, tells the British Prime Minister, Mr. Harold Wilson, that it is now imperative that immediate independence be granted to Rhodesia because attractive financial facilities for development purposes had been offered to Rhodesia upon attaining independence.⁴⁾ In a letter dated 11th September, 1965, Ian Smith expresses disappointment at the lack of progress to the Secretary of State for Commonwealth Relations, Arthur Bottomley,⁵⁾ while in a letter dated 15th September, 1965, Ian Smith says that he must make it clear that if Arthur Bottomley visits Rhodesia for discussions the discussions must reach final decisions on the position.⁶⁾ Again, in a letter dated 20th October, 1965, Ian Smith informs Harold Wilson that the statesmanlike thing for him to do is to grant independence.⁷⁾

(2) Reasons advanced for claim to Independence by Rhodesia.

Southern Rhodesia advanced the following reasons to support a grant of independence to it by the United Kingdom.

Prior to the dissolution of the Federation of Rhodesia and Nyasaland the Prime Minister of Southern Rhodesia was informed that "Her Majesty's Government accept in principle that Southern Rhodesia like other territories will proceed through normal processes to independence."⁸⁾

The/...

4) Ibid, p.55.

5) Cmnd. 2807, p.64.

6) Ibid., p.65.

7) Ibid., pp. 99-100.

8) Ibid., pp. 5, 60.

The acknowledgment of the rights of Nyasaland and Northern Rhodesia respectively to independence made Southern Rhodesia's position impossible.⁹⁾

The 1961 Constitution was an "independence" Constitution. It was a compromise which satisfied no section of the community but this compromise was accepted on assurance from Sir Edgar Whitehead, the Prime Minister of the time, that when his Government had negotiated the new Constitution they had done so in the belief that if the Federation were to break up, Southern Rhodesia would have complete independence. If this belief was unfounded, it was strange that no formal steps were taken at the time to inform the Government of Southern Rhodesia that the view held by the British Government was in direct conflict.¹⁰⁾ No statement was made contradicting Sir Edgar Whitehead's utterances and this supported the contention that there was an implicit understanding that Southern Rhodesia, by accepting the new Constitution, would be ensuring her own sovereign independence in the event of the Federation being dissolved.¹¹⁾

The British Prime Minister, Sir Alec Douglas-Home, at a meeting with Mr. Smith in London on 7th September, 1964, pointed out that there had been no such contract in 1961 and that Sir Edgar Whitehead had explicitly confirmed this in a recent public speech.

Mr. Duncan Sandys said that as the United Kingdom Minister

_____chiefly/.

9) Ibid., p.6.

10) Cmnd. 2807, p.15.

11) Ibid., p.18.

chiefly responsible for the 1961 Constitution he could confirm that he had given no such pledge in 1961. Mr. Smith said that he accepted these statements without reservation but pointed out that Sir Roy Welensky and Sir Edgar Whitehead must then have continued to deceive the electorate in Southern Rhodesia. The British Prime Minister said he could not comment on what Sir Roy or Sir Edgar might or might not have said during political meetings in Southern Rhodesia.¹²⁾ At a subsequent meeting on 10th September, 1964, he affirmed that he would be prepared to confirm to Mr. Smith in writing that no such undertaking as was alleged to have been given in 1961 was, in fact, either given or requested.¹³⁾ This he did in a message dated 16th September, 1964, in which he also referred to a speech by Sir Edgar in the Southern Rhodesia Legislative Assembly on 25th August.¹⁴⁾

(3) Principles Governing Negotiations.

From the start the British Government were anxious that Commonwealth nations should participate in the solution of the Rhodesian problem¹⁵⁾ though conceding that final settlement was a matter for the British and Southern Rhodesian Governments alone.¹⁶⁾ Southern Rhodesia, on the other hand, did not see the usefulness of Commonwealth participation and would only negotiate with the British Government.¹⁷⁾ Thus Southern Rhodesia indicated that it was not prepared to attend a conference convened between Sir Robert Menzies, Mr. Lester Pearson and President Nyerere to discuss/...

12) Ibid., p.22.

13) Ibid., p.38

14) Cmd. 2807, p.39.

15) Ibid., pp. 6, 7-8, 43, 61, 95.

16) Ibid., pp. 10, 61.

17) Ibid., pp. 5, 6, 8-9, 38, 62, 96.

discuss the independence question.¹⁸⁾ It also regarded the idea of a constitutional conference which had the unanimous approval of the Commonwealth Prime Minister's Meeting as "absolutely unnecessary and out of the question", that if such a conference were to be called it would not attend and if any attempt were made by Britain to promote such a conference it would be interpreted as interference in their internal affairs.¹⁹⁾ In a joint Communique issued after talks between the Prime Minister (Sir Alec Douglas-Home) and Mr. Ian Smith it was made clear that the Prime Minister of Southern Rhodesia did not feel bound by any of the statements made at the Commonwealth Prime Ministers' Meeting to which he had not been invited.²⁰⁾

The Southern Rhodesian view was that any consultations and negotiations concerning independence would be at Government level.²¹⁾ In this regard it would therefore be unwise to make any proposals to African Nationalists without first ensuring that they were acceptable to the Rhodesian Government.²²⁾ The British Government was of the view that the granting of independence was a matter to be settled by negotiation between the respective Governments.²³⁾ In this regard Mr. Wilson at a meeting in Salisbury on 26th October, 1965, said that he would bear in mind Mr. Smith's wish that he should not, during his visit, put forward any concrete proposals to African representatives without first ascertaining whether they would be likely to be acceptable to the

Rhodesian/...

18) Ibid., p.6.

19) Ibid., p.62.

20) Ibid., p.38.

21) Cmd. 2807, pp. 45, 53, 56.

22) Ibid., p.103.

23) Ibid., p.57.

Rhodesian Government. But he would try to discover what kind of a compromise, in general terms, the Africans might be prepared to entertain. He would then wish to have a further discussion with Mr. Smith.²⁴⁾

(4) Procedures utilized in negotiations.

The independence negotiations were conducted by correspondence and at meetings between members of the Governments concerned. A chain of correspondence was conducted from 27th November, 1963 to 10th November, 1965.²⁵⁾ Meetings were held between the Prime Ministers at London on 7th September, 1964,²⁶⁾ 8th September, 1964,²⁷⁾ 9th September, 1964,²⁸⁾ 10th September, 1964,²⁹⁾ 30th January, 1965,³⁰⁾ 7th October, 1965,³¹⁾ 8th October, 1965,³²⁾ 11th October, 1965,³³⁾ at Salisbury on 26th October, 1965,³⁴⁾ and 29th October, 1965.³⁵⁾ In addition the Commonwealth Secretary and the Lord Chancellor visited Rhodesia in February - March 1965³⁶⁾ and the Minister of State for Commonwealth

Relations/...

24) Ibid., pp. 110-111.

25) This is reproduced ibid.

26) The records of these meetings will be found ibid., pp.21-26, 26-30.

27) The record is reproduced ibid., pp.30-34.

28) The record is reproduced ibid., pp.34-36.

29) The record is reproduced ibid., pp.37-38.

30) This was an informal meeting due to the presence of Mr. Smith in London to attend the State Funeral of Sir Winston Churchill. See Cmd. 2807, p.56.

31) The record is reproduced ibid., pp.69-79.

32) The record is reproduced ibid., pp.80-90.

33) The record is reproduced ibid., pp.90-95.

34) The record is reproduced ibid., pp.90-95.

35) The records of these two meetings are reproduced ibid., pp. 111-116, 117-132.

36) Ibid., p.58.

Relations in July, 1965.³⁷⁾ Finally, there was a series of meetings on 30th and 31st October, 1965, between the Commonwealth Secretary and the Attorney General and Rhodesian Ministers.³⁸⁾

In addition, other meetings were proposed by each side but these did not materialize. The Secretary of State for Commonwealth Relations offered on 19th October, 1964, to come to Salisbury to discuss matters with Mr. Smith but as the latter would not agree to his meeting Mr. Nkomo and the Rev. Sithole he found it impossible to visit Rhodesia.³⁹⁾ Mr. Harold Wilson invited Mr. Smith on 23rd October, 1964, to visit London for talks.⁴⁰⁾ Mr. Smith indicated a willingness to go⁴¹⁾ but the proposed meeting did not take place because Mr. Smith would not go without first receiving an assurance that it was not British Government policy that Rhodesia should only be given independence when under African control⁴²⁾ whereas Mr. Wilson considered that this was laying down prior conditions for the talks.⁴³⁾ On 29th March, 1965, Mr. Harold Wilson invited Mr. Smith to London for private discussions. He was willing, as a first step, to ask the High Commissioner in Salisbury to explore matters with Mr. Smith to see if they could formulate points of agreement and points which might require further negotiation. Alternatively, he suggested

that/...

37) Ibid., p.63.

38) Ibid., p.132.

39) Ibid., pp.42, 44-45.

40) Ibid., p.42.

41) Ibid., p.43.

42) Ibid., p.47.

43) Cmnd. 2807, pp. 47-48.

that Mr. Smith should send an emissary for discussions in London or that he should send one to talk to Mr. Smith in Salisbury.⁴⁴⁾ Nothing came of the suggestion. Mr. Smith does not even allude to it in subsequent correspondence. The Commonwealth Secretary on 13th September, 1965 proposed a visit to Salisbury,⁴⁵⁾ but this did not materialize because Mr. Smith wished the visit to take place before the end of September,⁴⁶⁾ whereas the Commonwealth Secretary could not come at such an early date.⁴⁷⁾

(5) General proposals made during negotiations.

These will be discussed before specific issues arising between the parties are considered.

Private proposals, the terms of which were not fully disclosed, were put forward by Mr. Winston Field in February 1964,⁴⁸⁾ but these were unacceptable to the British Government.⁴⁹⁾ The same happened in March, 1964.⁵⁰⁾

The Rhodesian Government alleged that proposals had been put forward by them at the time of Mr. Hughes' departure from Rhodesia on 27th July, 1965 but the British Government denied that any concrete proposals had been put forward by either side during Mr. Hughes' visit.⁵¹⁾

On/...

44) Ibid., p.58.

45) Ibid., pp. 64-65.

46) Ibid., p.65.

47) Ibid., p.66.

48) Ibid., pp. 9-10.

49) Ibid., pp. 10-11.

50) Ibid., pp. 13-14.

51) Cmd. 2807, p.64.

On 21st December, 1964, Mr. Wilson suggested that a small but high-level all-party mission composed of senior and experienced members of the British Parliament such as Privy Counsellors might visit Rhodesia in the fairly near future. They would acquaint themselves with the situation at first hand.⁵²⁾ Mr. Smith rejected this pointing out that as approximately 100 British Members of Parliament of all parties had visited Rhodesia over the past eight years no useful purpose would be served by the suggested visit.⁵³⁾

When Mr. Bottomley in a message dated 13th September, 1965 proposed visiting Salisbury, Mr. Smith suggested that he should come with concrete proposals to present and that they should be able to reach final decisions. No good purpose would be served by Mr. Bottomley's coming to Salisbury without a mandate.⁵⁴⁾

The British Government also proposed five principles upon which they would need to be satisfied before granting independence.⁵⁵⁾ These principles are discussed in detail at a later stage as specific issues arising between the negotiating parties.⁵⁶⁾ At this stage it is only intended to comment briefly on the principles in general as a basis for discussion and the relationship of the 1961 Constitution to them. The original Rhodesian claim was that independence should be given on the basis of the 1961 Constitution.⁵⁷⁾

However/...

52) Ibid., p.51.

53) Ibid., p.53.

54) Ibid., p.65.

55) These are outlined ibid., p.66.

56) Infra, pp. 34-58.

57) Cmd. 2807, pp. 19, 100.

However, the British attitude was that the grant of independence on the basis of the 1961 Constitution did not satisfy the five principles.⁵⁸⁾ The 1961 Constitution was not sacrosanct, it was not a Constitution for independence and changes would have to be made in it.⁵⁹⁾ The 1961 Constitution could, however, serve as a basis upon which work could proceed in arranging a Constitution for independence and certain improvements could be made in it.⁶⁰⁾ The position may therefore be said to be that the 1961 Constitution was a basis upon which to work but it would have to be adapted to conform to the five principles before it was acceptable as an independence Constitution. The Rhodesian view on the other hand was that the 1961 Constitution covered the five principles.⁶¹⁾

The five principles nevertheless were accepted by each side as a basis for discussion and negotiations.⁶²⁾

As we have seen there was disagreement on the question whether the 1961 Constitution satisfied the five principles but it can be said that the parties were indeed very far apart on all the five principles and the gap seemed to grow.⁶³⁾ The agreed communique issued during the meetings in London in October, 1965 highlights the differences separating the parties.⁶⁴⁾

(6)/...

58) Cmd. 2807, p.100.

59) Ibid., p. 110.

60) Ibid., p. 112.

61) Ibid., p. 99.

62) Ibid., pp. 66, 99.

63) Ibid., pp. 79, 82.

64) Ibid., p.90.

(6) Specific matters and issues arising between the parties.

Generally speaking, the points of difference between the parties arose out of the so-called "five principles", which are herein-after described, but it must be stated that controversy was not confined to this sphere. In dealing with the issues the five principles will be treated separately from other miscellaneous issues and the latter will be dealt with first.

(a) Miscellaneous Matters and Issues.

(i) The Question of Membership of the Commonwealth.

It would seem as if this was not a matter of great importance. Southern Rhodesia was indeed willing to take, and indeed asked for independence outside the Commonwealth.⁶⁵⁾ The British Government, however, maintained that whether independence was granted inside or outside the Commonwealth was immaterial and that the real difficulty lay in the restricted nature of the franchise.⁶⁶⁾ Even if a constitution could be devised which was acceptable to the people as a whole, Southern Rhodesia might still have to remain outside the Commonwealth because the arrangement might not be accepted by other members of the Commonwealth.⁶⁷⁾ In reply to this Mr. Smith stated that independence was more important than membership of the Commonwealth.⁶⁸⁾

(ii)/...

65) Cmd. 2807, pp. 11, 33, 55, 67-68.

66) Ibid., pp. 11, 67-68.

67) Ibid., p. 33.

68) Ibid.

(ii) The possibility of U.D.I.

This was at all times in the minds of the negotiating parties and reference is made to it several times. Mr. Duncan Sandys stated that the press had been reporting that Southern Rhodesia might be contemplating a unilateral declaration of independence.⁶⁹⁾ Mr. Smith admitted that the Government of Southern Rhodesia had given considerable thought to U.D.I. as one way of attaining independence.⁷⁰⁾ The economic consequences of U.D.I. were described by Mr. Duncan Sandys⁷¹⁾ and were later confirmed by Sir Alec Douglas-Home who also pointed out that there could be no question of recognition, Rhodesia would be regarded as being in revolt and there could be no question of the Queen being regarded as Head of State of an independent Southern Rhodesia in revolt.⁷²⁾ Mr. Harold Wilson again confirmed the consequences of U.D.I.⁷³⁾ and because he regarded them in a serious light he suggested at one stage a Constitutional Conference to avert them.⁷⁴⁾ He did, however, affirm that there would be no British military intervention in the event of U.D.I. and that he had brought this point home forcefully to the African Nationalists Mr. Nkomo and the Rev. Sithole.⁷⁵⁾ He also asked Mr. Smith

for/...

69) Ibid., p.11.

70) Ibid., pp. 23, 35.

71) Ibid., pp. 11-12.

72) Cmnd. 2807, p.29.

73) Ibid., pp. 50, 87.

74) Ibid., p.87.

75) Ibid., p. 111.

for a categorical assurance that no U.D.I. would be made,⁷⁶⁾ an assurance which Mr. Smith apparently felt unable to give.⁷⁷⁾ He begged Mr. Smith again:

"even at the eleventh hour (18th October, 1965) for the sake of your country, for the sake of Africa and for the sake of future generations of all races, to pause before bringing hardship and misery, perhaps even worse, to your own people and to countless others far beyond your borders, who have no power to influence your decision but whose lives may be gravely affected by it." ⁷⁸⁾

Mr. Smith replied that no hardship and misery would flow from any action taken by the Rhodesian Government but directly from actions taken by the British Government and those whom it had induced to support it.⁷⁹⁾

(iii) Political Prisoners.

This question was raised once only. Sir Alec Douglas-Home referred to the proposal made at the Meeting of Commonwealth Prime Ministers that a Constitutional Conference should be called and that the political prisoners in Rhodesia should be released. Mr. Smith stated that no individuals were in prison for purely political reasons and Africans who were confined to certain areas of the country could secure their release, provided that they behaved in a law-abiding and constitutional manner.⁸⁰⁾

(iv)/...

76) Ibid., p.43.

77) Ibid., p.50.

78) Ibid., p.98.

79) Cmnd. 2807, p.100.

80) Ibid., p.33.

(iv) The question of the grant of independence upon approval by the people alone.

The argument was advanced that if the people as a whole approved the terms of a settlement then, regardless of the content of the settlement so approved, independence should be granted. Approval by the people as a whole was but one of the British Government's five principles so that insistence that it alone was a sufficient basis for independence was in fact tantamount to saying that the other four principles insisted upon by the British were in fact superfluous and could be disregarded if only this condition were seen to be met. Mr. Harold Wilson in fact saw the position in this light.⁸¹⁾ Thus Mr. Smith wanted the United Kingdom Government to accept in principle that he was entitled to independence if he could demonstrate that he had African support⁸²⁾ and when making concrete proposals relating to the composition of the Legislature asked why if these proposals were found to be acceptable to the people should the United Kingdom Government feel entitled to object.⁸³⁾ At one stage Mr. Harold Wilson seemed to accept the proposition that independence would be granted on any basis which the British Government were satisfied was acceptable to the people as a whole.⁸⁴⁾ Subsequently, however, he made it clear that fulfilment of this one condition was not enough.⁸⁵⁾

Mr. Smith/...

81) Ibid., p. 122.

82) Ibid., p.27.

83) Ibid., pp. 122-123.

84) Ibid., p. 49.

85) Ibid., pp. 122, 136.

Mr. Smith alleged in correspondence with Mr. Wilson that he had agreed with Sir Alec Douglas-Home that Rhodesia could have independence on the basis of the 1961 Constitution, if it could be proved that this was acceptable to the people of Rhodesia as a whole.⁸⁶⁾

Mr. Wilson denied that such an agreement had been made.⁸⁷⁾

It would appear that no such agreement was made. Sir Alec pointed out that even if a basis acceptable to the people as a whole could be devised (1) there could be no guarantee that this would necessarily be accepted by some other members of the Commonwealth,⁸⁸⁾ and (2) a new situation would arise which the British Government would have to consider on its merits. They would still not be committed to grant independence.⁸⁹⁾ Mr. Smith should be under no illusion that they might have to say, when the time came, that it was not to their satisfaction.⁹⁰⁾

(b) The Five Principles.

(i) Unimpeded progress towards majority rule.

Although the African Nationalists were not prepared to accept an independence which was not preceded by majority African rule,⁹¹⁾ it is quite clear that it was not the intention/...

86) Cmd. 2807, pp. 135, 138.

87) Ibid., p.136.

88) Ibid., pp. 32-33.

89) Ibid., p. 34.

90) Ibid., p. 35.

91) Ibid., p. 111.

intention of the British Government to insist on majority rule prior to the grant of independence⁹²⁾ and indeed the African Nationalists were informed that they could not expect it in the future.⁹³⁾ What the British Government insisted upon was unimpeded progress towards majority rule even though the attainment of the latter might be in the post-independence phase. Mr. Wilson indicated that he had an open mind on the timing of majority rule⁹⁴⁾ and indeed it would not be possible to prescribe a fixed period of time because the period could only be measured in functional terms.⁹⁵⁾ However the principle and intention of unimpeded progress to majority rule, already enshrined in the 1961 Constitution, would have to be maintained and guaranteed.⁹⁶⁾ The Rhodesian Government added provisos to this in that they would have to be satisfied that the majority rule which would in time result from the Constitution would have to be a reasonable and responsible one and they were not prepared to increase the rate of progress to majority rule.⁹⁷⁾

In estimating the time within which majority rule might be attained Mr. Wilson was of the view that there was clearly no early prospect of it as there was no intention on the part of the Rhodesian Government to do

anything/...

92) Ibid., pp. 48, 59, 111. Sir Alec Douglas-Home however seems to have taken a contrary view at one stage of the negotiations. See Cmnd. 2807, p.35.

93) Cmnd. 2807, p.111.

94) Ibid., pp. 48, 50.

95) Ibid., p. 111.

96) Ibid., p. 66.

97) Ibid., p. 68.

anything to accelerate the education of Africans for this purpose.⁹⁸⁾ Mr. Smith considered that the achievement of majority rule would be a lengthy process especially in view of the African boycott of the Constitution but the Rhodesian Government would not detract from the principle.⁹⁹⁾ When Mr. Wilson ultimately proposed the establishment of a Royal Commission¹⁰⁰⁾ he suggested that it would need to undertake a certain amount of basic factual research to forecast how long it would be before suggested schemes resulted in majority rule.¹⁰¹⁾

Another difficulty arose here because the Rhodesian Legislature had the power to virtually eliminate the "B" roll.¹⁰²⁾ Mr. Wilson could not consider a settlement which would allow the Rhodesian Parliament such powers though Mr. Smith pointed out that the 1961 Constitution did not empower the Legislature to prevent ultimate majority rule but only enabled it to delay it.¹⁰³⁾

(ii) Guarantees against retrogressive amendment of the Constitution.

Here it is necessary to deal separately with the question of guarantees against the retrogressive amendment of the specially entrenched provisions of the 1961 Constitution and the ordinary provisions of the Constitution, both of which, subject to certain adaptations, were likely to be incorporated in an independence constitution.

Amendment/...

98) Ibid., p.81.

99) Ibid., pp. 71-72.

100) See Infra, p. 55.

101) Cmnd. 2807, p. 121.

102) Cmnd. 2807, p.105.

103) Ibid., pp. 105, 124.

Amendment of the specially entrenched clauses.

It would appear that in principle the Rhodesian Government were unable to accept any form of constitutional safeguard which would prevent the Europeans in Rhodesia from altering the Constitution if they deemed it necessary to prevent the premature emergence of an African Government.¹⁰⁴⁾

The existing procedures for the amendment of the specially entrenched clauses were (1) by referenda of all four races and (2) by Her Majesty on the advice of the United Kingdom Government.¹⁰⁵⁾ The former was a clumsy procedure and invidious in that it involved assigning individuals to different race groups. Also the Asian group (constituting one percent of the population) could block desirable amendments. The latter method would have to disappear on independence.¹⁰⁶⁾ The problem therefore was to devise alternative methods of entrenchment to replace these two procedures. The replacement, however, had to be something as "strong" as the referendum¹⁰⁷⁾ The following alternatives were preferred in the negotiations:

- (A) A Senate with the power to block constitutional amendments was suggested by the Rhodesians.¹⁰⁸⁾

The question of the composition of the Senate resulted in acute disagreement and deadlock.¹⁰⁹⁾

At/...

104) Ibid., pp. 67, 68.

105) Palley, p. 435; Cmd. 2807, p. 73.

106) Cmd. 2807, pp. 73, 110.

107) Ibid., p. 75.

108) Ibid., pp. 65, 123.

109) Ibid., p. 123.

At first the Rhodesians proposed a Senate comprised of Europeans only,¹¹⁰⁾ later they suggested a minority of Africans in the proposed Senate¹¹¹⁾ and finally they were prepared to concede that it should be entirely composed of Africans.¹¹²⁾ They insisted however that the Senate should be composed of twelve chiefs only.¹¹³⁾ The chiefs were unacceptable to the United Kingdom because there could not then be said to be a democratically elected block as the chiefs were paid servants of the Rhodesian Government.¹¹⁴⁾

Another suggestion here was the "panel" suggestion put forward by Mr. Lardner-Burke. There should be twelve seats in the Senate. A panel of candidates for six of the twelve seats might be nominated by the chiefs while a panel of candidates for the remaining six seats might be put forward by the Electoral College for the Constitutional Council. The actual elections might then be made by the electorate on the "B" Roll or, perhaps, by the combined electorate on the "A" and "B" Rolls. This would ensure that candidates for the Senate would be responsible individuals.¹¹⁵⁾ Mr. Wilson

was/...

110) Ibid., p.70.

111) Ibid., p.66.

112) Ibid., p.70.

113) Ibid., pp.66, 133.

114) Ibid., pp. 73, 74, 75.

115) Cmd. 2807, p.93.

was prepared to examine this proposal¹¹⁶⁾ and thought that it should receive further consideration¹¹⁷⁾ but nothing came of it.

(B) A blocking quarter of Africans in the Legislative Assembly was suggested by the Rhodesians on several occasions.¹¹⁸⁾ Originally this was not acceptable to the United Kingdom because it did not provide for a sufficient increase in African Representation¹¹⁹⁾ but later they were prepared to consider it.¹²⁰⁾ Again, however, disagreement over the composition of the blocking quarter resulted in deadlock.¹²¹⁾ Again the issue was nomination versus election of members. The Rhodesians felt that two additional seats should be given to the Africans in the House of Representatives, thus giving them a blocking quarter, but that the two additional members should be chiefs as they felt strongly that the chiefs should have some representation in Parliament.¹²²⁾ The United Kingdom did not object in principle to some representation of the chiefs in Parliament but could not accept them as an integral element in a blocking quarter.¹²³⁾

They/...

-
- 116) Ibid., p. 93.
117) Ibid., p. 123.
118) Ibid., pp. 66, 109.
119) Ibid., p. 74.
120) Ibid., p. 123.
121) Ibid., p. 123.
122) Ibid., pp. 66, 109.
123) Ibid., p. 110.

They suggested that two additional "B" Roll seats should be filled by election thus giving the Africans a blocking elective quarter.¹²⁴⁾

- (C) A blocking third of Africans in the legislative Assembly was suggested by the United Kingdom.¹²⁵⁾

Again, however, disagreement over the composition of the blocking third resulted in deadlock.¹²⁶⁾

The Rhodesians suggested a blocking third consisting of the 15 "B" Roll seats plus twelve chiefs.¹²⁷⁾

The chiefs were not acceptable to the United Kingdom¹²⁸⁾ which also considered that the margin of

two votes was not a sufficient constitutional safeguard.¹²⁹⁾ They suggested a "B" Roll consisting of twenty-six seats for constitutional purposes.¹³⁰⁾

- (D) A variation of (C) above or rather a combination of (A) and (C) above was also tentatively suggested, viz. that a Senate of twelve should be constituted, that it should vote with the House and that two-thirds majority should be required for amendment.¹³¹⁾

This suggestion was subject to the same defect as the former proposals in that there was disagreement over composition.

(E)/...

124) Ibid., pp. 66, 134.

125) Cmd. 2807, pp. 74, 123, 133.

126) Ibid., p. 123.

127) Ibid., pp. 70, 133.

128) Ibid., pp. 73, 74.

129) Ibid., p. 133.

130) Ibid., pp. 74, 75.

131) Ibid., p. 73.

(E) The United Kingdom also suggested that amendment should be made by a two-thirds majority of the Legislative Assembly (as at present constituted and in which therefore the Africans with fifteen "B" Roll seats did not have a blocking third), but thereafter the Bill should be submitted to the entire electorate for approval and in this connection the "B" Roll electorate should be increased to include all adult taxpayers.¹³²⁾ There was no agreement on this.

(F) Mr. Wilson also suggested a referendum of adult taxpayers as a suitable means of amendment¹³³⁾ but nothing came of this suggestion either.

(G) The last suggestion was the conclusion of a Solemn Treaty between the United Kingdom and Rhodesia¹³⁴⁾ at the time of granting of independence.¹³⁵⁾ According to the Rhodesians it would not be acceptable to them if it incorporated reservations going beyond the Constitution. It would simply reinforce the Constitution.¹³⁶⁾ The British were anxious that/...

132) Ibid., p. 133.

133) Cmd. 2807, p. 110.

134) Ibid., p. 92.

135) Ibid., p. 104.

136) Ibid., pp. 92, 127.

that the Treaty should comprise all five principles.¹³⁷⁾ Further points arose concerning registration, construction and sanctions for breaches of the proposed treaty. The United Kingdom suggested that the treaty should be registered at the United Nations¹³⁸⁾ but Rhodesia would not agree to the United Nations being involved.¹³⁹⁾ On the construction of the Treaty, suggestion was made that the Privy Council, the International Court of Justice or the proposed Commonwealth Court of Appeal should adjudicate on disputes arising out of the Treaty.¹⁴⁰⁾ The Privy Council was most favoured by the Rhodesians.¹⁴¹⁾

On the question of sanctions for breach of the Treaty Rhodesia suggested the measures outlined before by the United Kingdom as consequences of a Unilateral Declaration of Independence. The British view was that the action contemplated in those statements was appropriate as the immediate response to an illegal act but it would not necessarily be appropriate as a sanction for a treaty.¹⁴²⁾ On the whole Mr. Wilson was not very enthusiastic about the treaty proposals.¹⁴³⁾ He referred to the not entirely happy precedent of the

treaty/...

137) Ibid., p. 104.

138) Ibid., p. 92.

139) Ibid., p. 104.

140) Ibid., pp. 92, 104.

141) Ibid., p. 104.

142) Cmnd. 2807, p.92.

143) Ibid., pp. 103-104.

treaty of guarantee with Cyprus¹⁴⁴⁾ and he added that his colleagues in the Cabinet might not be easily convinced that a treaty would satisfy the criteria they had in mind.¹⁴⁵⁾

Ultimately it was agreed that a Treaty would not provide any real help in solving the problem because the United Kingdom envisaged a much more comprehensive type of Treaty than would be acceptable to the Rhodesian Government.¹⁴⁶⁾

As agreement could not be reached on any of the above propositions it follows that it was not possible to devise an acceptable method of entrenchment for the specially entrenched provisions of the 1961 Constitution.

During the negotiations on this matter two further points arose between the parties. It was suggested that there should be a permanent and irreversible right of recourse to the Privy Council in anyone who alleged that his rights had been infringed by legislation.¹⁴⁷⁾ The United Kingdom also suggested a new special entrenchment of Chapter III of the existing Constitution relating to the delimitation and number of constituencies and electoral districts but no agreement could be reached on this.¹⁴⁸⁾

Ordinary/...

144) Ibid., pp. 92-93.

145) Ibid., p. 104.

146) Ibid., p. 127.

147) Ibid., pp. 127-128, 134.

148) Cmd. 2807, p.134.

Ordinary Constitutional Amendments.

The United Kingdom considered that there were defects in the 1961 Constitution in that there were no adequate safeguards for the unentrenched provisions and that this was the time to rectify the matter.¹⁴⁹⁾ In particular the Rhodesian Legislature under the 1961 Constitution had power to reduce the "B" Roll and thus delay, if not prevent, the achievement of ultimate African majority rule.¹⁵⁰⁾ What was needed was a guarantee against such reduction.¹⁵¹⁾ In any event the proposed changes in the Constitution could not be confined to the entrenched clauses.¹⁵²⁾ This matter proved to be a major stumbling block¹⁵³⁾ and was even described by the parties as the fundamental difficulty.¹⁵⁴⁾ On the one side the Rhodesian Government insisted that the existing machinery for amendment by a two-thirds majority should continue unaltered.¹⁵⁵⁾ On the other side the United Kingdom required the maintenance of the present two-thirds provision and an increase in the "B" Roll seats to provide a blocking third for amendment.¹⁵⁶⁾

In brief the United Kingdom wished to more or less equate the entrenched and ordinary provisions of the Constitution in so far as amendments are concerned

whereas/...

149) Ibid., p. 106.

150) Ibid., p. 105.

151) Ibid., p. 122.

152) Ibid., pp. 110, 124.

153) Ibid., pp. 93, 103.

154) Ibid., pp. 106, 128.

155) Ibid., pp. 93, 103, 129, 133.

156) Ibid., pp. 74, 93, 133.

whereas the Rhodesians wished to draw a clear distinction between them. As we have seen too the measures which the United Kingdom proposed in relation to all constitutional amendments were unacceptable to the Rhodesians even in relation to the entrenched provisions. Thus disagreement was complete.

(iii) Immediate improvement in the political status of the African population.

This involved in essence two questions: (1) more representative institutions and (2) an extension of the franchise.

The British pressed for greater African Representation in the legislative institutions.¹⁵⁷⁾ They pointed out that if an elected blocking third was created this would at the same time give increased African Representation.¹⁵⁸⁾ They regarded the idea to extend the franchise on the "B" Roll as helpful and a significant advance but they drew attention to the fact that it would not give the Africans more seats, i.e. increased representation.¹⁵⁹⁾ They proposed an elected Senate comprised of Africans and an increased number of African seats in the Legislature¹⁶⁰⁾ but this was unacceptable to the Rhodesians who would make no such concessions.¹⁶¹⁾ One of the reasons given was the refusal of the Africans to co-operate in taking advantage of the present Constitution.¹⁶²⁾ The
Rhodesians/...

157) Cmnd. 2807, pp. 35, 122.

158) Ibid., p. 74.

159) Ibid., pp. 75, 81, 122.

160) Ibid., p. 75.

161) Ibid., p. 75.

162) Ibid., pp 68, 74.

Rhodesians were willing to enlarge the legislature but insisted that the existing ratio of "A" Roll to "B" Roll seats should be preserved in an enlarged legislature.¹⁶³⁾

The other question was the extension of the franchise which was described by Sir Alec Douglas-Home and Mr. Duncan Sandys as incomparably more restrictive than that of any other British territory to which independence has hitherto been granted.¹⁶⁴⁾ Originally, the Rhodesians pressed for the elimination of the system of cross-voting in return for the extension of the franchise¹⁶⁵⁾ but eventually they agreed to forego this.¹⁶⁶⁾ In the result the sides succeeded in achieving agreement on the extension of the franchise on the "B" Roll to qualified indigenous adult taxpayers.¹⁶⁷⁾ It was estimated that this would give a vote on the "B" Roll to approximately one million persons.¹⁶⁸⁾

(iv) Progress towards ending racial discrimination.

In principle the British considered that what mattered was that the general impression of racial discrimination within Rhodesia must be removed by some signs that discrimination was really being progressively reduced.¹⁶⁹⁾

In this regard it was essential that there should be some dramatic forward move in relation to e.g. the

Land/..

163) Ibid., p. 33.

164) Cmnd. 2807, p. 16.

165) Ibid., pp. 34, 67.

166) Ibid., p. 75.

167) Ibid., p. 135.

168) Ibid., pp. 70, 81.

169) Ibid., p. 77.

Land Apportionment Act¹⁷⁰⁾ which should be repealed or amended.¹⁷¹⁾

The Rhodesian Government should at least admit publicly that its repeal was desirable in principle.¹⁷²⁾ The United Kingdom also raised the question of opening Salisbury to Africans and that of education.¹⁷³⁾

The Rhodesians said that they were considering modifications to the Land Apportionment Act which would have the effect of admitting Africans to non-racial areas for business and residential purposes and they would continue to study such modifications.¹⁷⁴⁾ They would consider withdrawing certain parts of it when it seemed desirable to do so. Already five million acres of land formerly European had been made available to Africans. The Act was of value in protecting Africans from exploitation. As regards racial discrimination in the towns they were presently considering several multiracial areas. They were examining whether that part of the Salisbury trading area which was adjacent to the Kopje could be made a multi-racial area. On the question of integration of schools this type of change made for a worsening of racial relations rather than for their improvement. It was up to those who wanted multi-racial education to provide it. Nothing would be done to prevent them. It was unreasonable that existing schools for one race should be turned into multi-racial schools without the consent of the parents/...

170) Ibid., p. 71.

171) Ibid., p. 67.

172) Ibid., p. 76.

173) Ibid., p. 76.

174) Cmd. 2807, p. 68.

parents. The creation of a multi-racial teachers' training college had been allowed.¹⁷⁵⁾

The United Kingdom considered, however, that sufficient steps had not been taken,¹⁷⁶⁾ that the Rhodesian concessions were not significant,¹⁷⁷⁾ and that the Rhodesian attitude to education was indefensible in terms of progress towards a multi-racial society.¹⁷⁸⁾ Nevertheless they considered that the distance between the two sides was less on this principle than on the others¹⁷⁹⁾ and that the matter could perhaps be dealt with in the context of acceptability to the people.¹⁸⁰⁾

- (v) The British Government must be satisfied that any basis proposed for independence was acceptable to the people of Rhodesia as a whole.

The principle was insisted upon right throughout the negotiations by the United Kingdom¹⁸¹⁾ and indeed the principle was accepted by both sides.¹⁸²⁾ It was agreed that as far as European opinion was concerned, a referendum on the present franchise on both sides would suffice.¹⁸³⁾ The problem however was the means by which the African acceptance should be demonstrated and on this both parties were uncommitted¹⁸⁴⁾ and indeed in profound disagreement as will shortly appear. The following proposals were put forward.

(A)/...

175) Ibid., p.76.

176) Ibid., p.67.

177) Ibid., p.71.

178) Ibid., p.76.

179) Ibid., p.80

180) Ibid., p.122.

181) Cmd. 2807, pp.22, 23, 35, 49, 59, 77.

182) Ibid., pp. 39, 66.

183) Ibid., p.30. Such a referendum was held on 5th November, 1964. Ibid., p.42.

184) Ibid., pp. 37, 39.

(A) Rhodesia proposed that African opinion could be best ascertained through the established tribal system whereby two hundred tribal Chiefs and five hundred tribal Headmen could represent three million of the three and a half million African population and an indaba would be called for this purpose.¹⁸⁵⁾ Mr. Smith asked the British Government to nominate observers to attend such an indaba¹⁸⁶⁾ but they refused as this might be interpreted as implying a commitment on their part to accepting this method of consultation as representing the opinion of the people as a whole.¹⁸⁷⁾ The indaba took place at Domboshawa between 21st and 26th October, 1964.¹⁸⁸⁾ The British Government saw several problems in relation to the indaba procedure. In the first place they did not see that the Chiefs and Headmen were genuinely representative of African opinion¹⁸⁹⁾ and thus that the opinion of the people as a whole would not be reflected at such an indaba.¹⁹⁰⁾ After the indaba was held they would not accept that acceptability had been demonstrated by it.¹⁹¹⁾ In the second place it was clear from Mr. Wilson's questioning of the Council of Chiefs that they had little comprehension of the terms of the existing Constitution which was not true of the African Nationalist/...

185) Ibid., p.23.

186) Ibid., p.40.

187) Ibid., p.41.

188) Ibid., p.42.

189) Ibid., p.24.

190) Ibid., p.41.

191) Cmnd. 2807, pp. 48, 52, 59, 77.

- Nationalist delegations.¹⁹²⁾ In the third place the question of impartial supervision under the control of neutral observers was mentioned at one stage.¹⁹³⁾
- (B) Mr. Smith suggested that there might be a main indaba preceded by a series of preliminary indabas which would enable each chief to ascertain the opinion of his own tribe.¹⁹⁴⁾ Nothing came of this suggestion. Presumably it was subject to the same objections as the previous proposal.
- (C) Mr. Smith suggested that Mr. Wilson might satisfy himself by taking the views of the principal African Nationalist leaders and of the Africans in the Constitutional Council and in the Parliamentary Opposition, the views of the chiefs and the Europeans being more precisely known, and Mr. Wilson agreed that this was a possible way.¹⁹⁵⁾ Nothing, however, came of the suggestion presumably because both parties saw the difficulty of probable non-participation in such an arrangement by the African Nationalists.¹⁹⁵⁾
- (D) In principle the United Kingdom required something in the nature of a referendum or some method of democratic consultation.¹⁹⁶⁾ At one stage it appeared that Rhodesia might be prepared to go

some/...

192) Ibid., p. 115.

193) Ibid., pp. 28-29.

194) Ibid., p. 28.

195) Ibid., p. 109.

196) Ibid., pp. 28, 31, 112.

some distance in this direction¹⁹⁷⁾, but in general it can be said that such procedures found no favour with it as will shortly appear. In relation to such democratic consultation the United Kingdom put forward the following suggestions.

1. A constitutional conference should be held.¹⁹⁸⁾

This was not acceptable to Rhodesia¹⁹⁹⁾ which maintained that this would undermine the authority of the chiefs by implying that they were not sufficiently representative of their people for these purposes and that local opinion would not simply stand another conference before Southern Rhodesia was granted independence.²⁰⁰⁾

2. A referendum should be held.²⁰¹⁾ The Rhodesians saw several problems in this particular suggestion. In the first place it was impractical²⁰²⁾ in that the Africans would not understand the questions put to them which were of a complex and sophisticated nature.²⁰³⁾ In the second place it would undermine the standing of the chiefs as spokesmen of their tribes.²⁰⁴⁾ In the third place it was difficult to reconcile the principle of individual

consultation/...

197) Ibid., p. 34.

198) Cmd. 2807, pp. 23, 33, 61, 87.

199) Ibid., pp. 23, 25, 62, 87.

200) Ibid., p.25.

201) Ibid., p.24.

202) Ibid., p.24.

203) Ibid., pp. 23, 24, 25, 28.

204) Ibid., p. 24.

consultation (as in a referendum) with the traditional tribal system. It might indeed be impossible to do so.²⁰⁵⁾

3. An indaba followed by some method of popular consultation.²⁰⁶⁾ Here it was suggested that the Chiefs and Headmen might arrange some kind of referendum.²⁰⁷⁾ The Rhodesians indicated however, that they might be prepared to ask the Chiefs and Headmen to canvass opinion in their tribes and villages before attending the indaba but there should be no question of trying to turn this process into any kind of referendum.²⁰⁸⁾ Again they saw the suggestion of popular consultation as undermining the authority of the chiefs²⁰⁹⁾ and as mere pandering to African Nationalist leaders who had not even bothered to register on the voters' rolls and who would now be getting a "double opportunity".²¹⁰⁾
4. The referendum procedure in the 1961 Constitution might be utilized.²¹¹⁾ The Rhodesians saw difficulties here in that one percent of the population (the Asian Group) could nullify a referendum, the process was cumbersome and in addition the assignment of individuals to racial/...

205) Ibid., p. 32.

210) Ibid., p.27.

206) Ibid., p. 27.

211) Ibid., p.77.

207) Ibid., p. 28.

208) Cmd. 2807, p. 25.

209) Ibid., pp. 27, 28.

racial groups was an invidious process.²¹²⁾

The United Kingdom replied that it did not contemplate what might amount to four separate electoral colleges. On this point they would be inclined to support a single referendum.

Mr. Smith pointed out however, that this would be virtually a referendum on "one man one vote" and would be unacceptable.²¹³⁾ It might also be added that the African Nationalists rejected an acceptability test verified by reference to various groups of the population.²¹⁴⁾

5. A referendum which went beyond the confines of the existing electorate on the "A" and "B" Rolls should be held. Here various suggestions were made, viz. that some one million Africans should be added to the "B" Roll and that the "A" and "B" Rolls together might provide the basis of a referendum,²¹⁵⁾ that a referendum of all adult taxpayers should be held²¹⁶⁾ - this should also have the effect of adding one million Africans to the electorate for the purpose of the referendum. At an earlier stage it was even suggested that the addition of one million African taxpayers might not be sufficient.²¹⁷⁾ All these suggestions were rejected/...

212) Ibid., p. 78.

213) Ibid., p. 91.

214) Ibid., p. 112.

215) Ibid., p. 78.

216) Cmnd. 2807, p. 112.

217) Ibid., p. 81.

rejected by the Rhodesians on the grounds that the independence issue was too complex to be understood by the vast majority of Africans participating in such a wide referendum.²¹⁸⁾

(E) As will shortly be seen, the United Kingdom proposed a Royal Commission to investigate the resolution of the differences between the sides. It was suggested that the separate issue of the method of testing acceptability should be left entirely to the Commission.²¹⁹⁾ The Commission should commence its work by discussing this issue.²²⁰⁾ It was suggested that it should submit an interim report²²¹⁾ and that although considerable weight should be attached to the recommendations of the Commission, the two Governments must be entitled to examine the Commission's proposals before deciding whether they could accept them.²²²⁾

In the ultimate no means of testing African opinion acceptable to both sides was found. As the British Government saw it, the Rhodesian Government was not prepared to contemplate any process of consultation which might be rejected²²³⁾ to which the Rhodesians countered that it would be invidious and embarrassing to both Governments if agreement was reached on a basis for independence and if this was subsequently rejected.²²⁴⁾

(F)/...

218) Ibid., pp. 78, 81, 115.

223) Ibid., p. 67.

219) Ibid., pp. 119, 136.

224) Ibid., p. 68.

220) Ibid., p. 123.

221) Ibid., p. 120.

222) Ibid., p. 130.

(F) The Royal Commission.

Towards the end of the negotiations when it appeared as if disagreement on nearly all important points was complete (as appears from the foregoing)

Mr. Wilson proposed that he and Mr. Smith should jointly recommend to the Queen the appointment of a Royal Commission.²²⁵⁾ The Rhodesian Government were willing in principle to give it a try.²²⁶⁾ There was also agreement over the composition of the Commission. It should be headed by Sir Hugh Beadle and consist of one Rhodesian and one British nominee in addition.²²⁷⁾ The Commission should have the normal power to take formal evidence and to move freely amongst the people.²²⁸⁾ It would need to undertake a certain amount of basic factual research.²²⁹⁾

On the above there was broad consensus, but on the terms of reference, the principle of unanimity and binding nature of the Commission's ultimate recommendations there was disagreement.

On the terms of reference the British wanted wide terms. The Commission should be able to recommend the constitutional arrangements on the basis of which Rhodesia might proceed to independence.²³⁰⁾

The Rhodesians considered, however, that this
amounted/...

225) Ibid., p. 112.

226) Ibid., p. 118.

227) Ibid., pp. 112, 116, 120.

228) Ibid., p. 113.

229) Ibid., p. 121.

230) Ibid., pp. 112-113.

amounted to a blank cheque to the Commission and they wanted the terms of reference to be more specific.²³¹⁾ They had therefore tabled an alternative proposal which suggested that the terms be:

1. Independence on the 1961 Constitution - creation of a House of Chiefs of twelve;
2. Two-thirds majority of House of Chiefs voting with Parliament should have full power to alter any entrenched clauses.²³²⁾ Thus there was disagreement on the content of the basic document to be put to the Commission and Mr.

Lardner-Burke was of the view that the two Governments would never succeed in reaching agreement on it.²³³⁾ Eventually Mr. Wilson was prepared to consider the proposal with the narrow terms of reference envisaged by the Rhodesians but could not accept the Rhodesian attitude on the unentrenched clauses of the 1961 Constitution.²³⁴⁾ This he was only prepared to do on the understanding that Mr. Smith had agreed that there should be unanimity on the part of the Commission in making its recommendations.²³⁵⁾

On the principle of unanimity there was disagreement. The United Kingdom insisted on a unanimous/...

231) Ibid., p. 118.

232) Ibid., p. 116.

233) Cmd. 2807, p. 123.

234) Ibid., p. 140.

235) Ibid., p. 140.

unanimous recommendation²³⁶⁾ whereas the Rhodesians wanted provision made for majority recommendation.²³⁷⁾ The United Kingdom were under the impression that Mr. Smith had accepted the principle of unanimity²³⁸⁾ but Mr. Smith agreed that this would be essential "if the report was to carry conviction."²³⁹⁾

The United Kingdom would not agree to the recommendations of the Commission being binding.²⁴⁰⁾ The rights of the United Kingdom Parliament must be fully reserved. The Commission's report would obviously carry the greatest weight and there would have to be compelling reasons for rejection.²⁴¹⁾ On the other hand the Rhodesians required the recommendations to be binding,²⁴²⁾ described this point as being fundamental²⁴³⁾ and requested Mr. Wilson to sign that he would grant independence if the Commission found that this was acceptable to the people of Rhodesia as a whole.²⁴⁴⁾

Finally/...

236) Ibid., p. 121.

237) Ibid., pp. 139, 142.

238) Ibid., pp. 137, 140.

239) Ibid., p. 121.

240) Cmnd. 2807, pp. 113, 137.

241) Ibid., pp. 141, 143.

242) Ibid., pp. 116, 139, 142.

243) Ibid., p. 142.

244) Ibid., p. 116.

Finally, on 10th November, 1965, Mr. Wilson asked Mr. Smith that if the United Kingdom Government undertook to commend to Parliament a unanimous report by the Royal Commission that the 1961 Constitution was acceptable to the people of Rhodesia as a whole would the Rhodesian Government give a corresponding undertaking that if the Commission submitted a unanimous report that the 1961 Constitution was not so acceptable they would abandon their claim in this respect and would agree that the Commission should then proceed to devise a new constitution as a basis for independence. If the Commission failed to produce a unanimous report, the position of the two Governments would be wholly reserved. If these proposals were not acceptable to the Rhodesian Government arrangements should be made for a personal discussion between the two Prime Ministers.²⁴⁵⁾ The Unilateral Declaration of Independence was made on the following day.

245) Cmd. 2807, p. 143.

CHAPTER II.

THE INTERNATIONAL STATUS AND PERSONALITY OF
SOUTHERN RHODESIA BEFORE 11TH NOVEMBER, 1965.

SECTION I.

STATUS OF SOUTHERN RHODESIA IN GENERAL.

In the present Section the general international status of Southern Rhodesia at various times before 11th November, 1965 will be described. Thus the development of the status of the territory from being one under Lobengula, through the process of being a British Sphere of Influence, a Protectorate and finally a self-governing Colony will be outlined. Attention will also be paid to the status of the British South Africa Company and the Federation of Rhodesia and Nyasaland, both of which were intimately connected with the territory. In the following Section the more specific question of the status of Southern Rhodesia in relation to the provisions of Article 73 of the Charter of the United Nations between the years 1945 and 1965 will be discussed. In the third section of the Chapter, the extent of Southern Rhodesian personality will receive attention. This involves an examination of the extent of its treaty capacity, its personality as a member of international organization, its capacity to bear international responsibility, diplomatic rights and protect its nationals.

As in the former Chapter, it must again be stressed that this Chapter is merely of an introductory nature. Its purpose is to provide background material on the international law status of the territory before U.D.I. for the discussion of problems relating to the status of Rhodesia in the post-U.D.I. era. It does not attempt to be a detailed and exhaustive exposition of the various matters discussed in it.

Before/...

Before 1888 the territory was subject to the rule of Lobengula, the Matabele King.¹⁾ It often happened, in past centuries, that kings and rulers outside the ambit of Western Christian civilization were treated by European powers as possessing a degree of international personality while full personality, the capacity to enjoy all rights under international law, was reserved to western Christian states.²⁾ As early as the middle ages the notion existed that sovereignty could be exercised by infidels³⁾ and by the 15th Century by Non-Europeans,⁴⁾ pagans⁵⁾ and backward peoples.⁶⁾ The territory of such peoples could not be regarded as being res nullius.⁷⁾ Thus it was not subject to occupation.⁸⁾ But it could be acquired by other means, e.g. cession or/...

- 1) Palley, p.7.
- 2) Sorensen, pp. 9, 37, 39, 41; Akehurst, pp. 23-24.
- 3) Aquinas, Summa Theologica, Secunda Secundae, Venetiis, 1593. Q 10, Art. 10; Ernest Nys, Les origines du droit international, Paris & Brussels, 1894; Lindley, p.11.
- 4) C.H.Alexandrowicz, "New and Original States - The Issue of Reversion to Sovereignty" (45) International Affairs, 1969, p.465 at pp. 468-470 points out that the classic writers show that Non-European States had international personality before the 19th Century and (at p.471) that part of the continent of Asia must be considered as having entered the Family of Nations before the 19th Century. See too Nabob of the Carnatie v. East India Company, 2 Ves. Jun. 56; The Secretary of State in Council of India v. Kamachee Boye Sahaba, 13 Moo. P.C. 22; Secretary of State for India v. Sardar Rastam Khan and Others [1941] A.C. 356.
- 5) Lindley, p. 12.
- 6) T.A.Walker, A History of the Law of Nations, Cambridge, 1899, 1, § 120 et seq; Lindley, p.12.
- 7) Alberici Gentilis, De Iure Belli, (Ed. T.E.Holland), Oxford 1877, 1, XIX; John Selden, Mare Clausum, London, 1652, Ch. XX; H. Grotius, Mare Liberum, Amsterdam, 1712, Ch. 11; S. Pufendorf, Of the Law of Nature and Nations (tr. Kenneth) Oxford 1710, III, IV, VI; Lindley, pp. 17, 20. Gunther, Klüber, Blackstone, Heffter, Fiore, Woolsey, Pradier-Fodéré, Salomon, Bonfils, Jèze, Despagnet and the Institute of International Law (Lausanne) 1888 are all quoted in support by Lindley, pp. 14-16. Vattel, Phillimore, De Martens, Pinheiro-Ferreira, and Bluntschli all give a limited recognition to the sovereignty of backward peoples - Lindley, p.17. Westlake, Hall (who is ambivalent), Oppenheim, Laurence, Dudley Field, Martens-Ferrão, Heimbürger and Schwarzenberger, 1, pp. 81-83 deny the sovereignty of backward peoples - Lindley, pp. 18-19. State practice supports the view that it was not res nullius. Lindley, p.26.
- 8) Lindley, p. 26.

or conquest.⁹⁾ In Africa too these ideas found expression in practice.¹⁰⁾ In the process of expansion into the newly opened regions of 19th Century Africa, where the established states found nothing which was recognizable as a state, they would annex the territory, but where communities with political institutions were found, these would normally be treated with.¹¹⁾ This shows that these latter communities did possess some measure of personality even under the "European" system of international law.¹²⁾ It was recognized by European Powers that sovereignty resided in local rulers¹³⁾ and their territories were not

res nullius/

- 9) Lindley, pp. 26, 43. Where the people agreed to place themselves under the acquiring state it was regarded as cession - even if they were forced - for forced agreements were then part of international law. If it was taken from them by force against their will it was regarded as conquest. Lindley, p. 44. The principle that lands inhabited by backward peoples were open to acquisition by Christians by means other than occupation was recognized by State Practice over the centuries. Bull of Nicholas V, 1452, Bull of Alexander VI, Inter Caetara, Letters Patent of Henry VII, 1495, to John Cabot, Letters Patent of François I, 1540, Charter of Elizabeth I, 1578, to Sir Humphrey Gilbert, Charter of the same to Raleigh, Charters of James I in respect of Virginia and New England, French Grants 1635, 1642 to Compagnie des Isles de L'Amérique, Grant of Charles II 1670 to the Hudson Bay Company. For details see Lindley, pp.24-25.
- 10) Lindley, p.33. There was, however, a difference between Asia and Africa. In the countries of the East Indies there is room for a doctrine of reversion to sovereignty on the attainment of independence. But the scramble for Africa resulted in partition irrespective of ethnological and social tradition. Thus newly independent African states (unlike some of their Asian counterparts) can hardly claim identity with the vast numbers of States and Chieftainships which had disappeared in the melting pot of colonial absorption. Most of them are new States and reversion to sovereignty has no application. See Alexandrowicz, note 4) supra, pp. 472-473.
- 11) Lindley, p.17.
- 12) Sobhuza II v. Miller & Others [1926] A.C. 518. At the Conference of Berlin, 1884-1885, it was recognized that there might be African Sovereigns on the East Coast other than the Sultan of Zanzibar and the then hypothetical question of encountering sovereigns in the geographical basin of the Congo was discussed - Lindley, p.33.
- 13) The Conference of Berlin, 1884-1885 recognized that the rights of native chiefs included rights of sovereignty although in fact most of the chiefs had alienated these rights. The idea that local rulers had sovereignty is further supported by the fact that protectorates were assumed over their territories and the assumption of a protectorate implies the existence of a state to be protected - Lindley, pp. 33-34.

res nullius.¹⁴⁾ The community governed by Lobengula was such a community,¹⁵⁾ Lobengula himself was regarded as a sovereign¹⁶⁾ and treaties were concluded with him and his predecessors.¹⁷⁾

(1) British "Sphere of Influence".

There are a number of varieties of spheres of influence, only two of which are relevant in the present context:

- (a) A sphere of influence may be established over an area by agreement between colonizing powers. There is a promise by each of the powers to abstain from doing anything that might lead to the acquisition of sovereign rights within the sphere allotted to the other who is at liberty to acquire sovereign rights in the area by treaty or other appropriate method.¹⁸⁾

by/...

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- 14) Lindley, p. 34 says it emerges very clearly that lands in Africa were not res nullius when one considers the procedure by which the Powers extended their sovereignty in Africa. In general, territorial rights were obtained by cession from Native Chiefs - generally by making treaties with all the native chiefs in the area to be acquired.
- 15) Lindley, p. 37; In Re Southern Rhodesia [1919] A.C. 211. Lobengula's rule was that of a regular government in which the rule was his. He had a kind of Senate and popular assembly which he consulted. So there was no question of this being a case of whites settling where there is no recognizable form of sovereignty. Ibid., 214-215.
- 16) A treaty of 1888 describes Lobengula as "ruler of the tribe known as Amandabele together with the Mashona and Makalaka, tributaries of the same". The relation between the Mashonas and Matabele inter se was ambiguous but did not matter because in 1888, Queen Victoria recognized Lobengula as sovereign of both peoples. The British Government stated to the Portuguese Government that Lobengula was an "independent king" and "undisputed ruler over Matabeland and Mashonaland" who had not parted with his sovereignty. In 1889 the Colonial Secretary wrote to Lobengula saying that he was "King of the country" and no one can exercise jurisdiction in it without his permission. See In Re Southern Rhodesia, note 15) supra, at 214. Lobengula also granted mining concessions in 1880, 1882, 1888. Ibid., 216.
- 17) In 1836, there was a Treaty of Friendship and Alliance between the Governor of the Cape Colony and Umsiligas described as "King of the Abaqua Zooloo or Qua Machoban". In addition, there was the Treaty of 1888 described in note 16) supra.
- 18) Lindley, p. 206; Palley, p.4.

By treaties dated 12th May, 1886 and 30th December, 1886, France and Germany acknowledged Portuguese rights to exercise sovereignty between Angola and Mozambique without prejudice to any rights that may have been hitherto acquired by other powers and they would abstain from making acquisitions in the region so defined.¹⁹⁾ Portugal admitted that this recognition and engagement were not binding on other Powers but maintained they gave her a legal title which could be invoked before other nations.²⁰⁾ The United Kingdom refused to acknowledge such a title and eventually by Treaty dated 11th June, 1891, Portugal finally renounced her claim to much of the territory which France and Germany had recognized as being within her sphere of influence.²¹⁾

- (b) A sphere of interest may be created over the territory of a third state by agreement with that state. The latter might undertake not to dispose of its territory to any except the interested power.²²⁾

In 1888, a treaty, concluded by one J.S.Moffat, British Resident Commissioner in Bechuanaland with Lobengula, was ratified by the British Government.²³⁾ Under it, the territory became a British "Sphere of Influence".²⁴⁾ A unilateral declaration to this effect was made by the High Commissioner for South Africa in April, 1888. In August 1888, the South African Republic was informed by telegram

that/...

19) Lindley, p. 213; Palley, p.6.

20) Lindley, pp. 213-214; Palley, pp. 5-6.

21) Lindley, p. 214; Palley, pp. 6-7.

22) Lindley, p. 206.

23) Palley, p. 6.

24) In Re Southern Rhodesia, note 15) supra, 214.

that 'the Lobengula country was regarded as being within the sphere of exclusively British interest' and in 1891, the High Commissioner issued a Proclamation declaring that any attempt to occupy the British sphere of influence would be deemed to be an unfriendly act.²⁵⁾ The treaty provided for peace between British Subjects and Lobengula's people. Lobengula undertook not to conclude treaties or enter into relations with other powers. He also undertook not to cede any of his territory to foreign powers except with the consent of Her Majesty's Commissioner in South Africa.²⁶⁾

Under this treaty of 1880, Britain did not acquire the territory²⁷⁾ but would merely be entitled to the individual rights enumerated in the treaty²⁸⁾ the existence of the sum total of which made the territory a sphere of influence. From 1889 onwards, the status of the territory, as such a sphere, was further consolidated by recognition on the part of other powers. At first, the South African Republic was indisposed to recognize the British claim to a sphere of influence and attempted to appoint a consul to Lobengula. The dispute continued through 1888 and 1889 but eventually President Kruger capitulated.²⁹⁾ By Convention in 1891, Portugal renounced her claim to the territory.³⁰⁾ Eventually, all the powers concerned had recognized the new sphere of influence.

Anglo/German/...

25) Palley, p.8.

26) Palley, p.7.

27) Lindley, pp. 227,236; Palley, p. 6; Oppenheim, 1, p. 514.

28) Lindley, p. 235.

29) Palley, pp. 8-9.

30) (43) British Foreign and State Papers (1891) 27; Lindley, p.214; Palley, p. 5. By this Convention, Portugal and Britain agreed on a boundary with Mozambique, arrangements were made for the construction of a railway to the coast, the Zambezi and its tributary were recognized as international waterways and the duty on transit goods through Mozambique was limited. See Chayes, 11, p. 1317.

Anglo-German, Portuguese and South African Republic treaties acknowledge this.³¹⁾ Lobengula retained an international personality. He was recognized as being a ruler and having sovereignty by the British.³²⁾ His territory within the sphere of influence was not territorium nullius and thus could not be acquired by occupation.³³⁾ Furthermore, there were duties in respect of the sphere of influence as the power cannot interfere (except by consent) with the autonomy of the local ruler and has no jurisdiction over his subjects.³⁴⁾ Cecil Rhodes and his associates secured a concession from Lobengula vesting in them exclusive mineral rights in the territory ruled by Lobengula.³⁵⁾ The British South Africa Company was chartered in 1889 and it acquired the rights under this Concession.³⁶⁾ This concession would, it is submitted, primarily be a municipal law contract.³⁷⁾ Its international law significance would only be that of any other concession, namely, that the state of nationality of the concession-holders (in this case the United Kingdom) would be entitled to exercise diplomatic protection in the event of a failure to honour the concession.³⁸⁾

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31) Palley, p.9.

32) In Re Southern Rhodesia, note 15) supra, 214.

33) Lindley, p. 39.

34) Lindley, p. 322. It was thought, however, that from the legal standpoint these duties were owed to other members of the Family of Nations who had made reciprocal promises with regard to their activities (e.g. Art. 6 of the General Act of the Berlin Conference) and not to the natives themselves. See Lindley, pp. 327, 333.

35) Palley, p.29. This was the Rudd Concession.

36) Article 2 of the Charter of the British South Africa Company. Palley, p. 35. It also acquired the rights under the Lippert Concession granted in 1891. In Re Southern Rhodesia, note 15) supra, 219.

37) Serbian and Brazilian Loans case, P.C.I.J. 1929, Series A, 20/21, p.41; Schwarzenberger, 1, pp. 71,74; O'Connell, 1, p.382; Brownlie, p.444; Akehurst, pp. 119-120. Of course, if the concession contract itself provides that international law will govern then that is the case. Akehurst, pp. 96-97.

38) Serbian and Brazilian Loans Case, note 37) supra; Schwarzenberger, 1, p.206; O'Connell, 11, p.764; Brownlie, p.444; Akehurst, p.120; Sorensen, pp. 489, 573. That this was so in the instant case is clear from the fact that Rhodes sought Imperial recognition of the Concession and that Queen Victoria approved it despite the fact that Lobengula repudiated it and Lobengula was so informed of the approval. See Palley, pp. 31-32. In the latter role, the United Kingdom was in fact protecting the concession holders.

(2) The Protectorate.

In 1891, an Order in Council was promulgated in terms of which general powers of administration and legislation were vested in the British High Commissioner in South Africa.³⁹⁾ For the first time, the United Kingdom is claiming to exercise governmental powers in the territory. Lobengula did not resist this encroachment and this failure was interpreted as acquiescence in British claims.⁴⁰⁾ It is doubtful whether as a matter of international law these events were sufficient to establish a British Protectorate over Lobengula's territory. A treaty would, of course, establish the matter beyond doubt.⁴¹⁾ However, acquiescence in a claimed right in circumstances where protest against the exercise of the right might reasonably be expected would normally have the effect of raising an estoppel which would prevent the entity involved from subsequently disputing the claimed right.⁴²⁾ The position, however, appears to be that no protectorate was formally claimed by Great Britain at this time and that the rights exercised and acquiesced in and which were, therefore, it is submitted, quite lawful were somewhat

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- 39) South Africa Order in Council 9th May, 1891; Palley, pp. 77-78. For text of the Order see In Re Southern Rhodesia, note 15) supra, 219-220.
- 40) In 1893, the Under Secretary for the Colonies explained that Lobengula had acquiesced in the exercise by the white authorities of jurisdiction over the whites and over the natives immediately connected with them. Palley, p.78.
- 41) This would manifest the express consent of the state to be protected. See Palley, pp. 76-77; O'Connell, 1, pp. 342-343; Oppenheim, 1, p. 178; Lindley, p.203.
- 42) Island of Palmas case, 1928, 2 R.I.A A., 829; Minquiers and Ecrehos case, I.C.J. Rep., 1953, 47 at 106; Anglo-Norwegian Fisheries case, I.C.J. Rep. 1951, 116 at 138. The principle is qui tacet consentire videtur si loqui debuisset ac potuisset. Temple of Preah Vihear case (Cambodia v. Thailand), I.C J. Rep., 1962, 5 at 22-23; O'Connell, 1, pp. 424-426; MacGibbon, "Some Observations on the Part of Protest in International Law" (30) B.Y.I.L., 1953, p. 293; Schwarzenberger, 1, pp. 306-308; Brownlie, p. 513.

less than the establishment of a protectorate. The submission, therefore, is that a Protectorate did not actually exist in 1891. In any event, the 1891 Order in Council applied only to Mashonaland and not to Matabeleland⁴³⁾ so that only the former would have been comprised in the Protectorate, assuming it to have existed.

Whether or not the above submission is correct, a Protectorate certainly existed from 1894 as a result of conquest and proclamation. In 1893-1894 Company forces invaded Matabeleland and conquered it. An Order in Council of 18th July, 1894 provided for the administration of the territory by the Company, through an administrator and a council of four appointed by the Company, subject to the approval of the Secretary of State.⁴⁴⁾ Legislative power was vested in the Board of Directors of the Company, subject to the limitations already described.⁴⁵⁾ On the above conquest, the Crown could, as a matter of international law, have annexed the territory for there had been a conquest for the Crown by the Company.⁴⁶⁾ Sovereignty was acquired by the United Kingdom as a result of such conquest.⁴⁷⁾ The Native sovereignty of Lobengula had terminated.⁴⁸⁾ On such conquest, it lay in the hands of the British/...

43) In Re Southern Rhodesia, note 15) supra, 225.

44) Matabeleland Order in Council, 1894. Despite its title, the Order applied to Mashonaland and Manicaland as well, i.e. all territories which were to comprise the future Southern Rhodesia. Palley, p.114; In Re Southern Rhodesia, note 15) supra, 225. For text of the Order see ibid., 224.

45) Formerly the Company would have had to seek the source of its administrative and legislative power in the sovereign - Lobengula - but now the source was the Crown. In Re Southern Rhodesia, note 15) supra, 222. Palley, p. 111.

46) The Company could not assert a conquest for its own benefit. In Re Southern Rhodesia, note 15) supra, 221, 238. Such Companies were not independent sovereigns so that when they acquired or exercised rights of sovereignty, at all events rights of external sovereignty, they were acting as agents for the state. Lindley, p.108; Palley, p.111.

47) Lindley, p. 44; Palley, p.110.

48) In Re Southern Rhodesia, note 15) supra, 241.

British Government to say what should be done.⁴⁹⁾ It had the powers of a conqueror. It might fix such terms and conditions as it thought proper; it might yield or retain the conquest; it might change part or the whole of the law.⁵⁰⁾ It could have annexed the territory,⁵¹⁾ which it chose not to do. The lesser measure of establishing a Protectorate instead, was also within its competence. It is true that colonial protectorates were normally established by agreement.⁵²⁾

It is sometimes asserted that such agreement is essential⁵³⁾ though it is conceded that the establishment of a protectorate could be implied from the provisions of certain agreements.⁵⁴⁾ Even if agreement was essential to establish a protectorate, it is submitted that the combined effect of the Order in Council of 1894 and the agreement of 1888 with Lobengula were sufficient to establish a protectorate over the Dominions of the latter and satisfy the requirement of agreement. In fact, the agreement of 1888 has been considered as sufficient to establish a protectorate by implication.⁵⁵⁾

It is now necessary to describe the characteristics of a colonial protectorate such as existed here.

It/...

49) Ibid., 221.

50) Palley, p. 110.

51) In Re Southern Rhodesia, note 15); supra, 239. Similarly, Swaziland was not annexed but jurisdiction extended in it. Sobhuza II v. Miller [1926] A.C. 518.

52) C.H. Alexandrowicz, "New and Original States - The issue of Reversion to Sovereignty" (45) International Affairs, 1969, p. 465 at p. 472.

53) Lindley, p. 203.

54) Such provisions implied the supremacy of the contracting power in that chiefs would be prohibited from making treaties and arrangements with other powers and from ceding their lands to foreign governments without the consent of the contracting power. See Lindley, p. 185.

55) Lindley, p. 185.

In the first place there was a difference between protectorates of the older type and the colonial protectorates established in Africa, an essential feature of the latter being that the colonial power had the right in so far as other members of the family of nations were concerned to take steps to annex the protected territory,⁵⁶⁾ though as we have seen this had to be by conquest or cession, both of which were liberally construed, or by prescription.⁵⁷⁾

In the second place, in all cases of colonial protectorates, external sovereignty is assumed by the protector.⁵⁸⁾ Thus the protector may demand that the protectorate should have no direct dealings with third states and may exercise a consequential right of supervising and dictating policy in matters affecting foreigners.⁵⁹⁾

In the third place, the internal sovereignty of the local ruler is unimpaired. If this is to be acquired, it must be derived from the express or implied consent of the native authority, the acquiescence of the native authority,⁶⁰⁾ or the powers of a conqueror.⁶¹⁾ Thus, in practice, the internal sovereignty of the local ruler may be scarcely impaired or it may be superseded by the protector to any extent, even completely. Usually such supercession proceeded gradually.⁶²⁾ The degree of supercession

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56) Lindley, p. 183.

57) Lindley, pp. 44, 80, 203; Alexandrowicz, note 52) supra, p. 472 says that the European protector in fact received carte blanche from the other contracting parties to the Berlin Act to deal with the protected entity and it usually aimed at annexation.

58) Lindley, p. 187; O'Connell, 1, p. 342.

59) Lindley, p. 322.

60) Lindley, pp. 187, 322.

61) Palley, p. 110.

62) Lindley, p. 187.

in many British Protectorates in Africa was so complete that they were administered like colonies.⁶³⁾

In the fourth place, the protectorate does not form part of the dominions of the protector. The inhabitants do not become nationals although they can be protected when in other countries and treaties between the protectorate and third powers remain in force. This is so as long as there has been no formal annexation and even though internal and external affairs are controlled entirely by the protector.⁶⁴⁾

In the fifth place, though it is clear that an international protectorate has international personality,⁶⁵⁾ the extent of which may vary from case to case depending on the degree to which third states are prepared to acquiesce in or recognize the agency of the protector,⁶⁶⁾ the colonial protectorate does not have international/...

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- 63) Lindley, p. 204. For instance, the Colony and Protectorate of Kenya was administered as a unit. On the assimilation of Protectorates to Colonies see Ex parte Mwenya [1960] I.Q.B. 241.
- 64) Lindley, p. 203; O'Connell, 1, pp. 343-344; R. v. Crewe, Ex parte Segkome [1910] 2 K.B. 576 at 603. Secretary of State for India v. Sardar Rustam Khan and Others [1941] A.C. 356. The inhabitants are aliens in municipal law but in international law they are British - Protected persons. Clive Parry, "Plural Nationality and Citizenship with Special Reference to the Commonwealth" (30) B.Y.I.L. 1953, p.244 at p. 252.
- 65) Nationality Decrees issued in Tunis and Morocco (1923) P.C.I.J. B.4, p. 27; Rights of United States Nationals in Morocco, 1952 I.C.J. Rep. at 188; Trochel v. Tunisia, I.L.R., 1953, p.47. The protectorate is a distinct entity in international law with international responsibility. O'Connell, 1, p. 342; Sorensen, pp.182, 262-263; Palley, p.44.
- 66) Third states have a discretion in this respect. Schwarzenberger, 1, pp. 93-94. However, relations between Protector and protectorate will be governed by international law (*ibid.*, p.94) and to that extent at least the protectorate will have personality. The question of the extent of personality is relative and depends on function. "Mais on peut d'expliquer les complications diverses ... des pays protégés, par l'idée de relativité et de divisibilité possible de la souveraineté... On est donc arrivé à ce résultat pratique de s'attacher à l'autonomie non pas du groupe, mais de l'exercice d'une fonction, pour le tout ou pour partie, par le groupe". Le Normand, pp. 71-72, 74.

international personality.⁶⁷⁾ It is part of the mother state though its separate existence may be relevant for certain purposes.⁶⁸⁾ The conclusion is that the protectorate had no international personality, but it is of course an entity which has an international law significance because the jurisdiction of the protector over it has been established in international law to the exclusion of other powers.⁶⁹⁾

(3) The British South Africa Company.

It is necessary here to see what the general position of Chartered Companies was in international law.

None of the chartered companies of the earlier periods were considered to be subjects of international law whether British, French or Dutch.⁷⁰⁾ This was the position of the Compagnie des Cent-Associés (1627), la Compagnie des Indes Occidentales, (1664),⁷¹⁾ the Dutch East India Company,⁷²⁾ the Hudson Bay Company, the East African Company and the British East India Company.⁷³⁾ Although the latter has been at times referred to as a sovereign power,⁷⁴⁾ it/...

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- 67) Schwarzenberger, l, p. 92; Brownlie, p. 108; Palley, p.45. It is submitted that this view is too rigid and dogmatic and that while in most cases colonial protectorates enjoyed no personality, there is no reason why in theory a limited entrustment of personality by the mother state should not have been possible. Colonies were so entrusted. Akehurst, p.75. As Akehurst says at pp. 75-76, no general rules should be laid down in respect of protectorates.
- 68) See Brownlie, p. 108.
- 69) Palley, p. 44.
- 70) Lindley, p. 99; Palley, pp. 22-23.
- 71) Castel, p. 71
- 72) Schwarzenberger, l, p. 80.
- 73) Schwarzenberger, l, p. 80; Castel, p.71; Nabob of the Carnatie v. East India Company, 1 Ves. Jun., 371 at 390, 393; Nabob of the Carnatie v. East India Company, 2 Ves. Jun., 66 at 70.
- 74) Lindley, p. 98; G.C.W. Forester and Others v. The Secretary of State for India in Council (1872) L.R. Ind. app. Sup. Vol 10; Ex Rajah of Coorg v. East India Company, 1860 Beav., 300 at 309.

it would appear that none of the above companies were subjects of international law but instead were agents or organs of the states by whom their Charters were granted.⁷⁵⁾ This connection is even more close in the case of the French and Dutch companies than in the case of the English,⁷⁶⁾ which were left very much to themselves by the parent state.⁷⁷⁾ That the Charter Companies were not international persons with rights or duties of their own in international law⁷⁸⁾ is clear from the fact that whatever they did or acquired e.g. territory, they did on behalf of their parent state⁷⁹⁾ and their Charters were ultimately revocable by the parent states.⁸⁰⁾ As organs or agents of their parent states it is quite clear, however, that these companies had international capacity i.e. certain acts performed by them produced consequences in international law and they had a certain status in international law.⁸¹⁾ The extent of such capacity would naturally depend upon the/...

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- 75) Schwarzenberger, 1, p. 80; Castel, p. 71; Lindley, p. 52; Palley, p. 23; Salaman v. Secretary of State in Council for India [1906] I.K.B. 613; Island of Palmas case, 1928, 2 R.I. A.A., 829. In Nabob of the Carnatie v. East India Company, 1 Ves. Jun., 371 at 393, it was held that not only was the Company not an independent sovereign but it did not even exercise a delegated sovereignty. In Nabob of the Carnatie v. East India Company, 2 Ves. Jun., 56 at 70, it was held that the Company was a mere subject. In Secretary of State in Council of India v. Kamachee Boye Sahaba, 13 Moo. P.C. 22 at 86, the Company was held to be a delegate.
- 76) Lindley, p. 99.
- 77) Lindley, p. 98.
- 78) Even where it was suggested that the British East India Company was a sovereign power, it was usually qualified by the statement that this was so in so far as the natives were concerned. See Lindley, p. 98; Ex Rajah of Coorg v. East India Company, 1860 Beav., 300 at 309.
- 79) Lindley, p. 99.
- 80) Lindley, p. 99. In English law this could be done by Act of Parliament, judicial process based on abuse of powers or consent of all concerned.
- 81) For example, Article V of the Treaty of Münster and the Treaty of Utrecht clearly show that both the Dutch East and West India Companies were entitled to create situations recognized by international law. The Acts of the Netherlands East India Company must be entirely assimilated to the acts of the Netherlands state itself. Island of Palmas case, 1928, 2 R.I.A.A., 829. L.C. Green, International Law through the Cases, London 1959, 2nd Ed., p.359.

the powers of the individual company under consideration.⁸²⁾ The following capacities did in fact reside in the earlier companies.

- (a) The power to commit the parent state in international law. In this respect, the company might commit the parent state to a state of peace or war with other powers,⁸³⁾ or might make treaties binding on parent states.⁸⁴⁾
- (b) The capacity to acquire on behalf of the parent state in international law. Thus when territory was acquired whether by agreement or otherwise, it was acquired for the parent state.⁸⁵⁾ The conclusion of contracts by the Netherlands Companies with natives was regarded as the exercise of sovereignty over the territory and might confer such powers as would justify the sovereign in considering it as a part of his territory.⁸⁶⁾

(c)/...

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- 82) Island of Palmas case, 2 R.I.A.A. 829; Nabob of the Carnatie v. East India Company, 1 Ves. Jun., 371 at 392.
- 83) Thus the peace between Spain and the Netherlands extended to "tous Potentats, nations et peuples" with whom the East or West India Companies in the name of the State of the Netherlands "entre les limites de leur dits Octroys sont en Amitié et Alliance." Island of Palmas case, note 81) supra. Under their Charter the British East India Company had the power to make peace and war which would bind the sovereign - Great Britain. Nabob of the Carnatie v. East India Company, 1 Ves. Jun. 371 at 392; Ex Rajah of Coorg v. East India Company, 1860 Beav., 300. Lindley, p. 99 refers to it as making war not only with native states but also with the Portuguese, Dutch and French - even when the respective sovereigns in Europe were at peace!
- 84) The Netherlands East India Company had the power to conclude Conventions even of a political character in accordance with Article 35 of its Charter of 1602. Island of Palmas case, note 81) supra. The British East India Company could do likewise. Nabob of the Carnatie v. East India Company, 1 Ves. Jun., 371 at 392; Nabob of the Carnatie v. East India Company, 2 Ves. Jun., 56 at 60.
- 85) Lindley, p. 99; G.C.W. Forester and Others v. The Secretary of State for India in Council, (1872) L.R. Ind. App. Sup. Vol. 10; The Secretary of State in Council of India v. Kamachee Boye Sahaba, 13 Moo. P.C., 22 at 86.
- 86) Island of Palmas case, note 81) supra.

- (c) The parent state was responsible in international law for the acts of the Chartered Companies, such responsibility being based on control.⁸⁷⁾
- (d) Since the companies were in effect organs of the parent state they could claim in certain cases state immunity, relying on the doctrine of act of state. Here, however, it must be mentioned that the companies possessed a dual character being both trading merchants and organs of state exercising sovereign powers.⁸⁸⁾ When they performed acts in the former capacity,⁸⁹⁾ they were in the position of private individuals and could not claim immunity from suit under the act of state doctrine.⁹⁰⁾ But when they exercised political powers they could claim such immunity.⁹¹⁾

For our purposes the position of the later chartered companies would not appear to be materially different from that of the earlier companies. The companies had no international personality.⁹²⁾ This was vested in the parent state exclusively. In the case of the German and Portuguese Charters, the sovereignty of the respective governments appeared on the face of the Charters.⁹³⁾ In the case of the British Charters, the position was not so clear,⁹⁴⁾ but the view/...

87) Palley, pp. 21-23. The problem arose particularly in relation to the British East Africa Company.

88) Ex Rajah of Coorg v. East India Company, 1860 Beav., 300 at 308-309.

89) As in Nabob of the Carnatie v. East India Company, 1 Ves. Jun., 371 at 393.

90) Ex Rajah of Coorg v. East India Company, 1860 Beav., 300 at 309.

91) Nabob of the Carnatie v. East India Company, 2 Ves. Jun., 56 at 60. The Secretary of State in Council of India v. Kamachee Boye Sahaba, 13 Moo. P.C., 22 at 86; Ex Rajah of Coorg v. East India Company, 1860 Beav., 300.

92) Lindley, p. 108.

93) Lindley, p. 104.

94) Lindley, p. 104.

view is that sovereignty here resided with the United Kingdom - which had the right to modify or withdraw the charter.⁹⁵⁾ In the case of the African companies, their charters placed them more completely under the control of the British Government especially in relation to foreign affairs.⁹⁶⁾

As with the earlier companies, these companies also had a similar international capacity. The company was an agent or organ of the parent state⁹⁷⁾ with the consequent capacity to commit the state and to acquire for it.⁹⁸⁾ Again, the State was internationally responsible for the acts of the Company⁹⁹⁾ and as an organ of state it would certainly have enjoyed immunity in the courts of other states.¹⁰⁰⁾

We may now turn to the specific position of the British South Africa Company which was formed in 1889.¹⁰¹⁾ From what we have seen, it will be obvious that the British South Africa Company, like other chartered companies, lacked international personality. It will also be apparent from what we have said that the Company would be capable of enjoying international capacity, the extent of which will now be described.

(a)/...

95) Lindley, p. 108.

96) Lindley, p. 108.

97) Lindley, p. 108.

98) Lindley, p. 108.

99) Palley, pp. 21-23.

100) The extension of state immunity to organs of government at all levels is very liberal. For a recent example see South African Airways v. New York State Division of Human Rights, 315 N.Y.S. 2d. 651; (65) A.J.I.L., 1971, pp. 403-405.

101) Palley, p. 33. The reasons for the formation of the Company were (1) financial - expansion was to take place at the expense of the Company Shareholders and not at that of the taxpayer; (2) the security of British interests in areas which Britain was not prepared to administer directly; (3) to fulfil international requirements relating to the establishment and exercise of jurisdiction in claimed areas. The same reasons prompted the formation of the British East Africa Company and the Royal Niger Company. See Palley, pp. 16-18.

(a) The capacity to commit the United Kingdom. Earlier companies, as we have seen, had power to commit the parent state to a state of war or peace and by treaty, such powers being given by their charter.¹⁰²⁾ The British South Africa Company had no such capacity. Its Charter provided that in any dealings with foreign powers, the Company was bound to act on the suggestions made to it by a Secretary of State while the Company was bound by all treaties and arrangements entered into by Britain at any time with other powers.¹⁰³⁾ Thus even though the Company was the internal government of the Protectorate until 1923, it had no representative powers internationally.¹⁰⁴⁾

(b) The capacity to acquire for the United Kingdom. Here again we must look initially at the Company's Charter. In terms of Article 2, it was permitted to exercise such powers as it might in future acquire by concession, agreement, grant, or treaty, subject to the approval of a Secretary of State. Thus there were two conditions for acquisition and proper exercise of governmental power in the area - acquisition from the proper authority in the aforesaid manner and approval by a Secretary of State.¹⁰⁵⁾

In/...

102) Supra, pp. 72-73.

103) Arts. 8, 22. Palley, pp. 36-37.

104) On the internal powers of the Company see its Charter, Arts. 3, 4, 10, 14, 22 and Palley, p.33.

105) Palley, p. 36, concludes that the Charter gave the Company no governmental powers - only the capacity to obtain the same.

In relation to the first condition, the Company acquired the Rudd Concession of 1888 which vested exclusive rights in them to all minerals in the territory¹⁰⁶⁾ and the Lippert Concession of 1891¹⁰⁷⁾ which gave the exclusive right "to lay out, grant, lease, for such period or periods as he (Lippert) may think fit, farms, townships, building plots, or grazing areas".¹⁰⁸⁾ Neither of these even purport to give governmental powers¹⁰⁹⁾ and it was understood that these powers could only be obtained from Lobengula who was the legal sovereign of the country and recognized as such by the British at the time.¹¹⁰⁾

Nevertheless, the Company did exercise a degree of administration in Mashonaland in 1890, appointing an administrator who issued regulations relating to various matters.¹¹¹⁾ It must be concluded that in the absence of the fulfilment of the two conditions such administration was an usurpation. As such it was an encroachment on the sovereignty of Lobengula which existed at the time. Since it was also ultra vires the Charter of the Company,¹¹²⁾ it was
ineffectual/...

106) In Re Southern Rhodesia [1919] A.C. 211 at 218.

107) Ibid., 219.

108) Ibid., 218.

109) Ibid., 218; Palley, p.36, says that whereas the Rudd Concession might by extensive interpretation have permitted legislation in respect of mining and its control, it could not be construed as delegating any other powers.

110) Palley, p. 36; In Re Southern Rhodesia [1919] A C. 211 at 218.

111) Palley, pp. 40-41, tells us that on arrival in Salisbury, the Administrator set up a headquarters there, laid out a township, dealt with mining laws and regulations which were in draft, initiated surveys and the opening of roads to the various mining centres, established postal communications and despatched missions to native chiefs. Eventually, by the end of 1890, there was a three-fold division of authority - Colquhoun (the Administrator) dealing with administrative details: Dr. Jameson dealing with all political and important matters, and, Colonel Pennefather with police questions.

112) See Palley, p. 36.

ineffectual in acquiring any further international law rights for the United Kingdom in what was at the time its sphere of influence.

From 1891 to 1894 the position changes, for with the acquiescence of Lobengula in company administration¹¹³⁾ and with the necessary permission of the Crown,¹¹⁴⁾ it is submitted that there was no longer an encroachment on sovereignty or any question of the company acting ultra vires. A specific right in international law to administer in its sphere of influence may have been acquired for the United Kingdom by the company but as previously submitted this was probably not sufficient to establish a protectorate in international law.¹¹⁵⁾

The 1893-1894 conquest of Matabeleland was a conquest by the company for the Crown and it had the effect of acquiring complete international law sovereignty in the territory for the United Kingdom.¹¹⁶⁾

(c) The international responsibility of the United Kingdom. It is clear that the United Kingdom would have borne international responsibility to other powers for the acts of the Company, as the latter was a "subordinate government" with no capacity for the conduct of foreign affairs.¹¹⁷⁾ The question actually arose in practice when claims were pressed on the United Kingdom by the South African Republic as a result of the Jameson raid.¹¹⁸⁾
_____ (d)/...

113) See note 40) supra.

114) South Africa Order in Council 9th May, 1891, S.8.

115) Supra, pp. 66-67.

116) See note 46) supra.

117) Palley, pp. 21-23; O'Connell, 11, pp. 965-966. See too note 103) supra; Brownlie, p. 376.

118) Palley, p. 22.

- (d) The Company could probably have enjoyed immunity from suit in the courts of foreign countries in relation to its political activities.¹¹⁹⁾ Being the government of a non-metropolitan territory without international personality, it could be classified as an organ of the central government and thus identical with it.¹²⁰⁾

(4) The Colony.

Southern Rhodesia became a colony of the United Kingdom upon annexation by the latter in 1923.¹²¹⁾ In such an annexed territory residual powers pass to the annexing state, the natives become nationals and fall fully under jurisdiction except in those cases where international agreements may have tempered or modified such powers to some extent.¹²²⁾ For the most part, the government of the Colony was autonomous in internal affairs.¹²³⁾

There/...

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- 119) Nabob of the Carnatie v. East India Company, 1 Ves. Jun., 371; Ex Rajah of Coorg v. East India Company, 1860 Beav., 300; Nabob of the Carnatie v. East India Company, 2 Ves. Jun., 56; The Secretary of State in Council of India v. Kamachee Boye Sahaba, 13 Moo. P.C., 22.
- 120) O'Connell, 11, p. 878; Isbrantsen Co. v. Netherlands East Indies Government, 75 F. Supp. 48 (1947); Van Heyningen v. Netherlands Indies Government, Ann. Dig., 1948, case no. 43; Huttinger v. Upper Congo Great African Lakes Railway Co., Ann. Dig. 1933-34, Case No. 65. American, Australian and French courts have declined to assume jurisdiction over the colonial dependencies of foreign states and British, French and American courts have granted immunity to their own dependencies. Brierly, p. 246. Mighell v. Sultan of Johore [1894] 1.K B. 149; Duff Development Co. v. Government of Kelantan [1924] A.C. 797; Kahan v. Federation of Pakistan [1951] 2 K.B. 1003; Sayce v. Bahawalpur [1952] 2 All E.R. 64.
- 121) Southern Rhodesia (Annexation) Order in Council, 1923, 30th July, 1923.
- 122) Lindley, p.323. Relevant undertakings here would be those contained in Article 6 of the General Act of the Berlin Conference but the view was that these were owed not to the natives but to the other members of the family of nations. See Lindley, pp. 327, 333.
- 123) Palley, pp. 242-246; Chayes, II, p. 1319.

There is, however, nothing to prevent territorial entities other than independent states from enjoying a limited degree of international personality.¹²⁴⁾ This limited international personality must naturally always coincide with the degree of personality which the mother-state retains, each, so to speak, supplementing the personality of the other. Thus international personality is divided in these cases and the content of the personality of each of the entities involved is different - the theory of differential personality.¹²⁵⁾ Personality is a shorthand term for the sum of faculties possessed by a legal actor, and those faculties may vary according to the acts performable. The result is a scale of legal competence, with the independent, fully sovereign state at the top but other entities occupying intermediate positions.¹²⁶⁾ To find out whether a given entity enjoys personality, and, if so, how much, one simply looks at the facts.

"The position of any entity is determined by political fact. If a territory is in certain respects, though not in other respects, a separate political actor it is clearly endowed by international law with the necessary faculties of legal action to give effect to this political reality".¹²⁷⁾

Naturally/...

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- 124) M. Broderick, "Associated Statehood - a New Form of Decolonization" (17) I.C.L.C., 1968, p. 368 at 396; Akehurst, p.75; Sorensen, p. 260. The traditional view was that only fully sovereign states had rights in international law. See Korowitz, "Some present aspects of Sovereignty in International Law" (102) Hague Recueil, 1961 at p.86; L'Huillier, Eléments de droit international public (1950) p.40; S. Bastid, Cours d'Institutions Internationales (1956) p. 244 et seqq.; O'Connell, 1, p. 80.
- 125) O'Connell, 1, pp. 82-83; Berezowski, "Les Sujets non souverains du droit international" (65) Hague Recueil (1938); Van Kleffens, "Sovereignty in international law" (82) Hague Recueil (1953) p.85.
- 126) Broderick, note 124) supra, p.396.
- 127) Ibid., Thus Laos, Cambodia, Vietnam, Egypt, Tunis and Morocco all had considerable autonomy in the conduct of external affairs before independence. Whiteman, 1, pp. 287, 289. In Trésor Public v. Cie. Air Laos, 1958, Annuaire français de droit international, p.725, the Court a quo decided that Laos in 1953 was a state in international law for the purposes of air carriage and that the provisions of the Warsaw Convention were applicable. The Netherlands Antilles and Surinam, though not independent, may accede to membership of certain international organizations. For their status see Van Panhuys, "The International aspects of the Reconstruction of the Kingdom of the Netherlands in 1954", Netherlands International Law Review, 1958, p.1, and "The Netherlands Constitution and International Law" (47) A.J.I.L., 1953, p. 537.

Naturally a colony like any other non-independent entity is capable of enjoying a limited international personality.¹²⁸⁾ The device by which limited personality devolves upon a colony or other non-independent territorial entity is that of entrustment by the mother country.¹²⁹⁾ The subordinate entity receives a power to negotiate directly with foreign states and to enter into certain kinds of treaty with them.¹³⁰⁾ Such entrustment invariably took place to a greater or lesser extent in the case of all the self-governing colonies¹³¹⁾ and lasted for a considerable time in the case of those colonies which evolved to independence over a considerable period of time instead of being granted independence at a specific point in time.¹³²⁾

As we have seen, Southern Rhodesia was a self-governing colony and in its case entrustment also took place, such entrustment increasing as time proceeded. The period of entrustment was, however, broken during the existence of the Federation of Rhodesia and
Nyasaland/...

128) Akehurst, p.75. Sorensen, p.262.

129) Broderick, note 124) supra, p.397.

130) Ibid. Third states who thereafter enter into relations with the subordinate entity must be deemed to have impliedly recognized the limited personality of the latter.

131) Akehurst, p.75; Sorensen, p.262; Broderick, note 124) supra, p.401; The 1887 Colonial Conference, Parliamentary Papers, Vol.56, Report of Proceedings, pp. 464, 476 recommended that self-governing colonies should have permission to enter into direct negotiations with foreign governments with respect to commercial matters but even before this, Canada had negotiated several differential tariff agreements with the U.S.A. and France. The privilege of separate negotiation was granted to the Australian States and New Zealand at the 1894 Colonial Conference. In recent times, entrustment has also been granted in the case of the Caribbean Associated States. The powers granted by entrustment are deemed to be delegated executive authority in external affairs. See Broderick, note 124) supra, pp. 371, 376-377.

132) This was the position in the case of the older Dominions, Australia, Canada, New Zealand and South Africa. But even in the case of the newly independent states, independence is usually preceded by a period of limited entrustment. See Akehurst, p.75.

Nyasaland and on the dissolution of the latter was again resumed by Southern Rhodesia.

Because of entrustment, Southern Rhodesia was able to gain an increased voice in both Commonwealth and International affairs.¹³³⁾ Southern Rhodesia attended the Imperial Economic Conference at Ottawa in 1932 and concluded bilateral trade agreements with Canada and the United Kingdom.¹³⁴⁾ It attended the Imperial Conference in 1937 as observers.¹³⁵⁾ By 1939, Southern Rhodesia could be quite legitimately regarded as a separate member of the Commonwealth for some purposes and as a dependency of the United Kingdom for other purposes.¹³⁶⁾ Thus it could communicate directly with other members of the Commonwealth but could not communicate with[^] foreign governments except through the ordinary channels of the British diplomatic service.¹³⁷⁾ By the time of the establishment of the Federation of Rhodesia and Nyasaland, it is clear that Southern Rhodesia could not only conclude agreements with Commonwealth countries¹³⁸⁾ but could also be a party to international treaties¹³⁹⁾ and participate separately in international organizations, usually of a technical or administrative character, with the assent of other members and the diplomatic assistance of the United Kingdom.¹⁴⁰⁾

The/...

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- 133) Chayes, 11, p.1319. Progressive entrustments were made from 1923 on. Palley, p. 724.
- 134) R.B.Stewart, Treaty Relations of the British Commonwealth of Nations, New York, 1939, p.21.
- 135) Ibid., p.22.
- 136) Ibid., p.21.
- 137) Ibid., p.22. However, inter-commonwealth relations of the time were probably not governed by international law because of the inter se doctrine. Ibid., p.328.
- 138) J.E.S. Fawcett, "Treaty Relations of British Overseas Territories" (26) B.Y.I.L., 1949, p.86 at p.105.
- 139) Ibid., p.102.
- 140) Ibid., p.106; Palley, pp. 362-363.

The Federation of Rhodesia and Nyasaland was formed in 1953.¹⁴¹⁾
The Constitution of the Federation provided that the United Kingdom might entrust the conduct of external affairs to the Federation.¹⁴²⁾
The device of entrustment of external affairs powers was used in the case of the Federation which from time to time received a grant of power to negotiate directly with foreign states and to sign and ratify certain classes of treaties without the intervention of the United Kingdom.¹⁴³⁾ A limited entrustment was made in 1953¹⁴⁴⁾ and a much wider grant was made in 1957.¹⁴⁵⁾ The entrustment was made in a Joint Declaration of the United Kingdom and Southern Rhodesian Governments of 27th April, 1957, and the competence it bestowed was described by the Federal Prime Minister as follows:

'the right to conduct all relations and to exchange representatives with Commonwealth countries without consultation with the United Kingdom Government;

'the right to appoint representatives to the diplomatic staffs of H.M. embassies;

'the right to conduct all negotiations and agreements with foreign countries subject to the need to safeguard the United Kingdom Government's international responsibilities;

'the right to appoint its own diplomatic agents, who will have full diplomatic status and who will be in charge of Federal missions, in any foreign countries prepared to accept them, and to receive such agents from other countries;

'the right on its own authority, to acquire the membership of international organizations for which it is eligible.'¹⁴⁶⁾

The/...

141) Rhodesia and Nyasaland (Federation) Act, 1953, 1 & 2 Eliz. II, C.30.

142) Federation of Rhodesia and Nyasaland (Constitution) Order-in-Council, 1953, S.I. No. 1199 - art. 29; Palley, p. 363.

143) Broderick, note 124) supra, p. 378.

144) These were the powers previously entrusted to Southern Rhodesia. Palley, pp. 363-364. See too International Law Association, The Effect of Independence on Treaties, London, 1965, p.51.

145) Ibid.; Palley, pp. 403, 407; J.E.S. Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965-1966, p.103 at p.105 describes this as a conscious enlargement of the international competence of the Federation.

146) See Fawcett, note 145) supra, pp. 105-106.

The above meant that the Federation was an international person,¹⁴⁷⁾ just as Southern Rhodesia was before it, and although it was not a full international person, i.e. an independent state,¹⁴⁸⁾ the degree of personality which it enjoyed was very extensive.¹⁴⁹⁾ In practice, however, the Federation did not exercise all the entrusted capacities to the fullest extent.¹⁵⁰⁾

It is now convenient to describe the precise extent of Federal international personality. Federal personality emerges in a number of spheres which will now be mentioned.

(a) Treaty capacity.

The Federation had the capacity to conclude treaties.¹⁵¹⁾ In pursuance of this capacity it concluded trade and customs agreements with the United Kingdom, Australia, South Africa, Canada, Bechuanaland, Israel, Japan and Portugal,¹⁵²⁾ and it concluded an extradition treaty with South Africa.¹⁵³⁾

(b)/...

147) Broderick, note 124) supra, p.397; Fawcett, note 145) supra, p.106.

148) Ibid.; Palley, p.365.

149) Palley, p.365; J.E.S. Fawcett, The British Commonwealth in International Law, London, 1963, p.114 says that as Commonwealth countries approach independence, the United Kingdom responsibility becomes attenuated almost to vanishing point. He then goes on to discuss the Federation.

150) Fawcett, note 145) supra, p.106.

151) Ibid.; Broderick, note 124) supra; Palley, pp. 350, 364; C.J.R. Dugard, "Succession to Federal Treaties on the Dissolution of a Federation" (82) S.A.L.J., 1965, p.430 at pp. 430, 436; C.J.R. Dugard, "Succession to Federal Treaties Revisited" (84) S.A.L.J., 1967, p.250; S.v. Eliasov, 1965 (2) S.A. 770 (T) Hiemstra, J. held at 773 that the Federation as a whole was a state with treaty-making capacity. See too S. v. Bull, 1967 (2) S.A. 636 (T).

152) Fawcett, note 145) supra, p. 106; D.P. O'Connell, State Succession in Municipal and International Law, Cambridge, 1967, 11, p.175.

153) S. v. Eliasov, 1965 (2) S.A. 770 (T); S. v. Bull, 1967 (2) S.A. 636 (T); O'Connell, note 152) supra, pp. 177-178. In addition, the Federation concluded double taxation agreements with the United Kingdom, South Africa, East Africa and a visa abolition agreement with Portugal. See O'Connell, note 152) supra, pp. 176, 177.

(b) Capacity to be a member of international organizations.

The Federation was a full member of the following international organizations: I.T.U.,¹⁵⁴⁾ W.M.O.,¹⁵⁵⁾ the G.A.T.T.,¹⁵⁶⁾ the African Postal Union,¹⁵⁷⁾ the African Telecommunications Union,¹⁵⁸⁾ the Commission for Technical co-operation in Africa South of the Sahara,¹⁵⁹⁾ the Scientific Council for Africa South of the Sahara,¹⁶⁰⁾ the Foundation for Mutual Assistance in Africa South of the Sahara,¹⁶¹⁾ International Red Locust Control Service,¹⁶²⁾ International Union for the Protection of Industrial Property,¹⁶³⁾ International Wheat Council.¹⁶⁴⁾

The Federation was an associate member of W.H.O.,¹⁶⁵⁾ and F.A.O.¹⁶⁶⁾

The/...

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- 154) Peaslee, 1. p.LVI; It acceded on 14th Dec., 1960. The Effect of Independence on Treaties, note 144) supra, p. 323; Fawcett, note 145) supra, p.106.
- 155) Peaslee, 1, p.LVII; It fell under article 3(e) of the W.M.O. Constitution being a territory not listed in annex 11 maintaining its own meteorological service but not responsible for the conduct of its international relations. Fawcett, note 149) supra, p.230.
- 156) Peaslee, 1, p. LVII; Broderick, note 124) supra, pp. 395-396; Fawcett, note 145) supra, p.106.
- 157) Peaslee, 1, p.6; Broderick, note 124) supra, pp. 395-396.
- 158) Peaslee, 1, p.14; Broderick, note 124) supra, pp. 395-396.
- 159) Peaslee, 1, p.272; Broderick, note 124) supra, pp. 395-396.
- 160) Peaslee, 1, p.279.
- 161) Peaslee, 1, p.281.
- 162) Peaslee, 11, p.1332.
- 163) Peaslee 11, p. 1473; Broderick, note 124) supra, p.395.
- 164) Peaslee, 11, pp. 1527, 1528.
- 165) Peaslee, 1, p.LVI; Broderick, note 124) supra, p.396; Fawcett, note 149) supra, p.230. It became a member on 14th May, 1954. The Effect of Independence on Treaties, note 144) supra, p.329.
- 166) Peaslee, 1, p. LVI; Broderick, note 124) supra, p.396; Fawcett, note 149) supra, p.230.

The Federation did not have separate membership of U.P.U., I.M.F. and I.B.R.D. In U.P.U. it was but a member of the British Colonies group and the British Overseas Territories as a whole was one member.¹⁶⁷⁾ It was comprised in the United Kingdom membership of I.M.F. and I.B.R.D.

The Federation also had membership of certain commonwealth organizations. It was a member of the Commonwealth Agricultural Bureau¹⁶⁸⁾ and the Inter-African Phyto-Sanitary Commission.¹⁶⁹⁾ In fact, during its existence, the Federation was for the most part treated as a Member of the Commonwealth vis-à-vis other members.¹⁷⁰⁾ Its Prime Minister took the place of the Southern Rhodesian Prime Minister at Commonwealth Prime Ministers' Conferences, at first obtaining an invitation ad hoc to attend but in 1956 a standing invitation.¹⁷¹⁾

(c) Diplomatic capacity.

From 1953, the Federation was allowed to exchange representatives with Commonwealth countries subject to the agreement of the United Kingdom.¹⁷²⁾ In 1957, this capacity was increased and the Federation could conduct all manner of representation with commonwealth countries directly.¹⁷³⁾ Thus the Federation appointed High Commissioners in London and Pretoria.¹⁷⁴⁾

At/...

167) Peaslee, 1, p. LVII; Fawcett, note 145) supra, p. 106.

168) Peaslee, 1, p.289; Broderick, note 124) supra, p.396.

169) Peaslee, 1, p. 768.

170) Palley, p. 365.

171) Palley, pp. 365, 403.

172) Palley, p.364.

173) Palley, p.364.

174) Fawcett, note 145) supra, p.106.

At this time, High Commissioners had ambassadorial status¹⁷⁵⁾ with consequent international law diplomatic immunity.¹⁷⁶⁾ In foreign countries there were representatives of the Federation attached to the British Embassies in Washington, Tokyo, Lisbon and Bonn.¹⁷⁷⁾ In addition, the Federation received diplomatic representatives from both foreign and commonwealth countries and arrangements for the treatment of such representatives was entrusted to the Federal government.¹⁷⁸⁾

(d) Capacity to bear international responsibility.

This would, naturally, be co-extensive with the sphere of Federal personality. Thus when India complained to the United Kingdom about an incident in Northern Rhodesia, described as racial discrimination against Indian diplomatic representatives, the United Kingdom declined to intervene saying that the responsibility was that of the Federation as a result of its enhanced status.¹⁷⁹⁾ On the question of the use of Northern Rhodesian territory to introduce military equipment

to/...

175) The office of High Commissioner had gradually become that of a diplomatic representative. In 1948, the Commonwealth Prime Ministers agreed in conference that the status should be assimilated to that of foreign envoys. See Fawcett, note 149) supra, p.198. In this respect, the inter se doctrine had become obsolete. Ibid., p. 144 et seqq.

176) For instance, the United Kingdom and New Zealand Legislation on diplomatic immunity extended to cover the representatives of the Federation. See Fawcett, note 149) supra, p.199.

177) Fawcett, note 145) supra, p.106; Palley, p.364.

178) Palley, pp. 364, 365.

179) Fawcett, note 149) supra, p.114; Palley, p. 365.

to Katanga, the Federal Prime Minister declared that intervention if necessary would be a matter to be decided solely by the Federal Government.¹⁸⁰⁾

(e) Capacity to protect nationals.

The Federation was permitted to enact its own citizenship legislation.¹⁸¹⁾

On the dissolution of the Federation¹⁸²⁾ the Government and Legislature of Southern Rhodesia assumed the powers previously exercised by the Federal government and legislature.¹⁸³⁾ Southern Rhodesia was promised a similar entrustment to that which the Federation had enjoyed.¹⁸⁴⁾ The Secretary of State for Commonwealth relations stated that the powers entrusted to Southern Rhodesia in the conduct of external affairs would be the same as those entrusted to the Federation.¹⁸⁵⁾ Such an entrustment was not, however, specifically made.¹⁸⁶⁾ Regardless of this, Southern Rhodesia regarded itself as continuing to enjoy the same competence as the Federation¹⁸⁷⁾ and it negotiated a commercial agreement with Japan/...

180) Fawcett, note 149) supra, p.114 who makes the apposite observation that if United Kingdom responsibility did not extend to this case, it is difficult to know what it did cover. See, however, O'Connell, note 152) supra, pp. 172-173 and the same writer "State succession and entry into a Composite Relationship" (39) B.Y.I.L., 1963, p.54 at p.127 who says that constitutional responsibility for the implementation of international obligations rested with the Federal Government while international responsibility remained with the United Kingdom.

181) Federal Citizenship Act, No. 12 of 1957; Palley, pp.350-351.

182) S.I. 2085/1963. Fawcett, note 145) supra, p.107.

183) Fawcett, note 145) supra, p.107. Palley, p.724.

184) Broderick, note 124) supra, p.378. O'Connell, note 152) supra, p.174.

185) Fawcett, note 145) supra, p.107; The International Law Association, The Effect of Independence on Treaties, London, 1965, p.51.

186) Ibid.; Broderick, note 124) supra, p.378. O'Connell, note 152) supra, p.174.

187) The International Law Association, The Effect of Independence on Treaties, London, 1965, p.51; Broderick, note 124) supra, p.378; O'Connell, note 152) supra, p.174.

Japan without making use of United Kingdom instrumentalities.¹⁸⁸⁾
The Southern Rhodesian argument was that by constitutional convention the entrustment had become an aspect of the international and constitutional status of the Federation and had devolved on its constituent members.¹⁸⁹⁾ In practice, the Southern Rhodesian government continued to operate on the lines of the entrustment formerly made to the Federal government.¹⁹⁰⁾ It largely obtained the international and Commonwealth memberships of international organizations possessed by the Federation and most of the treaties with the Federation continued to bind Southern Rhodesia.¹⁹¹⁾

From all the above, it will be seen that in principle Southern Rhodesia, as a colony, possessed a very substantial degree of international personality prior to 11th November, 1965.¹⁹²⁾

The/...

188) Broderick, note 124) supra, p. 378.

189) Ibid. Miss Broderick also poses the question whether entrustment once made can be revoked. Ibid.

190) Palley, p. 724.

191) Palley, pp. 724-725; O'Connell, note 152) supra, p. 174.

192) Palley, pp. 724, 730 states, however, that Southern Rhodesia possessed no such personality because its powers were delegated to it as a dependency by the United Kingdom. With respect, the writer disagrees. It is clear that a dependent territory may have international personality to the extent of its capacity to enter into international relations. See Fawcett, note 149) supra, p. 143. The fact that such personality has been delegated i.e. entrusted does not make any difference. As we have seen, Broderick, note 124) supra, p. 378 even suggests that such entrustment (or delegation) may be irrevocable. This, however, it is submitted, goes too far. The correct position lies somewhere between Palley's assertion and Broderick's suggestion. Entrustment may probably be revoked for the future and personality thus accordingly arrested. This is probably what happened after the Unilateral Declaration of Independence when the United Kingdom passed the Southern Rhodesia Act, 1965. But it would be contrary to good faith for a mother country to revoke entrustment in such a way as to cancel rights which a third state had already acquired against the dependency relying on the entrustment which had been made to it by the mother country.

The exact extent of this personality is considered later.¹⁹³⁾ But certainly Southern Rhodesia did not have the plenary personality of an independent state¹⁹⁴⁾ though it was near to this in many respects. The reason why it was not an independent state was the existence of constitutional limitations in the 1961 Constitution, freely accepted by Southern Rhodesia, and giving the United Kingdom certain powers over it,¹⁹⁵⁾ in particular the power of disallowance of certain legislation.¹⁹⁶⁾

The United Kingdom would, of course, have had primary international personality in respect of the territory since Southern Rhodesia was a dependency.¹⁹⁷⁾ But the actual content of this personality in the case of Southern Rhodesia was not great.¹⁹⁸⁾ The reason was that as Commonwealth countries approach independence the responsibility of the United Kingdom becomes attenuated, sometimes almost to vanishing point.¹⁹⁹⁾

SECTION II/...

193) Infra, pp. 105-118.

194) Fawcett, note 145) supra, p.107.

195) Fawcett, note 145) supra, p.107.

196) 1961 Constitution s.32 (1).

197) Palley, p. 730.

198) Though it was capable of expansion and revival at the expense of Southern Rhodesia by the device of revocation of entrustment in so far as this did not interfere with the rights of third states already acquired against the Colony. See footnote, 192) supra.

199) Fawcett, note 149) supra, p. 114.

SECTION II

STATUS OF SOUTHERN RHODESIA AS A NON-SELF GOVERNING TERRITORY WITHIN THE MEANING OF ARTICLE 73 OF THE UNITED NATIONS CHARTER.

We have just seen that Southern Rhodesia was not an independent state. It is now necessary to consider whether it was a self-governing territory. The reason is that if it was not a self-governing territory, the provisions of Chapter XI of the Charter of the United Nations would be applicable to it and the United Kingdom would have the obligations set out in Articles 73 and 74 of the Charter¹⁾ including, in particular, the duty to transmit to the Secretary-General of the United Nations the information required by Article 73 (e).

A territory which is not independent may nevertheless be self-governing. There is thus a distinction between the concepts of independence and self-government.²⁾ This is clear from two propositions:

- (1) A non-self-governing territory may achieve self-government in ways other than the achievement of independence. The General Assembly of the United Nations has accepted the following three ways:³⁾

(a)/...

- 1) The extent of these obligations is discussed infra, pp.657-660. when the position of the United Kingdom in the era after 11th November, 1965 is treated.
- 2) Akehurst, p.282; This was conceded by the Secretary General of the United Nations in 1967 and by the Special Committee on the Granting of Independence to Colonial Peoples. See Broderick, "Associated Statehood - a New Form of Decolonization" (17) I.C.L.Q., 1968, p.368; Rupert Emerson, "Self-Determination" (65) A.J.I.L., 1971, p.459 at p.470. In the same way, independence is not synonymous with self-determination and there may even be a conflict between these concepts. See A.H. Robertson, Human Rights in National and International Law, Manchester, 1968, p.290.
- 3) A. Res. 1541 (XV). The three ways specified were confirmed in A. Res. 2625 (XXV) which added a fourth way - the emergence of any other political status freely accepted by the people. See Emerson, note 2) supra, p.470, Akehurst, p. 282. Georges Fischer, "Le Problème Rhodesien" (11) Annuaire Francais de Droit International, 1965, p.41 at p.62; J.A.C. Gutteridge, The United Nations in a Changing World, Manchester, 1969, pp. 64-65.

- (a) Independence.⁴⁾ This need not be discussed.
- (b) Integration with an independent state. This occurred in the cases of Hawaii and Alaska.⁵⁾
- (c) Free association with an independent state. This has happened in several instances.

The United States placed Puerto Rico on the United Nations list of non-self-governing territories in 1946.⁶⁾ Subsequently, however, Puerto Rico achieved self-government⁷⁾ in association with the United States.⁸⁾ The United States reserves defence and external affairs.⁹⁾

In/...

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- 4) We might add that the basic standpoint of the Committee of 24 on decolonization would equate self-government with independence in principle but would approve exceptions to it. See Emerson, note 2) supra, p.470.
 - 5) J.A. de Yturriaga, "Non-Self-Governing Territories: The Law and Practice of the United Nations" (18) The Yearbook of World Affairs, 1964, p. 178 at p.195. Akehurst, p.282.
 - 6) Chayes, 11, p.1331.
 - 7) De Yturriaga, note 5) supra, p.195. In 1952, a new Constitution was adopted by joint action of the Puerto Rico legislature and the United States Congress creating the Commonwealth of Puerto Rico. The General Assembly in A. Res. 748 (VIII) accepted that it was no longer non-self-governing. See Chayes, 11, p.1331. Commonwealth Status was self-government and took the territory out of Chapter XI of the United Nations Charter. See José A. Cabranes, "The Status of Puerto Rico" (16) I.C.L.O., 1967, p. 531 at pp. 535, 537-538.
 - 8) Broderick, note 2) supra, pp. 398-399; Cabranes, note 7) supra, p. 533 points out that it is a form of free association, the name of the state being Estado Libre de Puerto Rico.
 - 9) Broderick, note 2) supra, pp. 398-399. On the status of Puerto Rico in general see Cabranes, note 7) supra, p. 531 et seqq.; E. Kraske, "Die Stellung Puerto Rico im Verbands der Vereinigten Staaten von Amerika" (15) Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht, 1953-54 p. 541 et seqq.

In the same way Surinam and the Antilles have achieved self-government in association with the Netherlands,¹⁰⁾ Greenland with Denmark,¹¹⁾ the six Caribbean States of Antigua, St. Kitts-Nevis-Anguilla, Dominica, St. Lucia, St. Vincent, Grenada with the United Kingdom,¹²⁾ the Cook Islands with New Zealand.¹³⁾

- (2) It was realized at the inception of the United Nations, and even before that,¹⁴⁾ that a territory might be self-governing and yet not independent.

Our basic enquiry then is whether Southern Rhodesia, admittedly not an independent state, was nevertheless self-governing between the years 1945-1965.

The Charter of the United Nations does not define non-self-governing territories.¹⁵⁾ The General Assembly therefore requested the various colonial powers to submit lists of their territories considered to be non-self-governing.¹⁶⁾ Such lists were submitted and in the United/...

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- 10) De Yturriaga, note 5) supra, p.195; Broderick, note 2) supra, pp. 399-400. For their status see Van Panhuys, "The International Aspects of the Reconstruction of the Kingdom of the Netherlands in 1954", Netherlands International Law Review, 1958, p.1; Van Panhuys, "The Netherlands Constitution and International Law" (47) A.J.I.L., 1953, p.537.
- 11) De Yturriaga, note 5) supra, p.195.
- 12) West Indies Act, 1967, C.4. These states have full self-government in internal affairs. Responsibility for external affairs and defence is reserved to the United Kingdom. The association is free and voluntary and is terminable at any time by either party but the United Kingdom has undertaken to give six months notice of intention to terminate. See Broderick, note 124) supra, p.371; Akehurst, p.282.
- 13) Cook Islands Constitution Act, 1964; Cook Islands Constitution (Amendment) Act, 1965. (New Zealand Statutes Vol. 1, no. 69, 70). Emerson, note 2) supra, p.470. The association is a free one with external affairs and defence the responsibility of New Zealand, Broderick, note 2) supra, pp. 390, 391.
- 14) See for instance the attitude to the Philippines in 1938. J.E.S. Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965-1966, p.103 at p.108.
- 15) De Yturriaga, note 5) supra, p.191.
- 16) Ibid.

United Kingdom lists the name of Southern Rhodesia was omitted.¹⁷⁾
The General Assembly noted the lists but did not query them.¹⁸⁾ In
addition, the Colonial states sent these lists on the understanding
that they reserved their rights to enlarge or reduce the lists in
future.¹⁹⁾ The conclusion from the above is that in 1946, Southern
Rhodesia was a self-governing territory in so far as Chapter XI of
the United Nations Charter was concerned.²⁰⁾

As time progressed the United Nations organs purported to assume
more competences in relation to non-self-governing territories in
general and, as a consequence, in relation to Southern Rhodesia in
particular. The following action may be isolated for discussion:

- (a) The General Assembly attempted to define the requisites of a
self-governing territory. In 1953 it adopted a list of
factors to be taken into account in deciding whether or not a
territory had attained self-government.²¹⁾ In 1960 further
principles were expressed.²²⁾

(b)/...

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- 17) Ibid. Chayes, 11, p. 1327; Fawcett, note 14) supra, p.108; Palley,
p. 728.
- 18) A.Res. 66(1); Palley, p.728; Chayes, 11, p.1327.
- 19) De Yturriaga, note 5) supra, p.191.
- 20) J.E.S. Fawcett, "Treaty Relations of British Overseas Territories"
(26) B.Y.I.L., 1949, p.86 at pp. 87, 88 couples Malta and Southern
Rhodesia together, both of which he regards as being self-governing.
- 21) A.Res. 742 (VIII). These included the ascertainment of the opinion
of the population freely expressed by democratic process, effective
participation of the population in the Government, universal and
equal suffrage, free periodic elections, absence of coercion of voters
and disabilities on political parties. See Chayes, 11, p.1329.
- 22) A. Res. 1541 (XV); The free and voluntary choice of the people
expressed through democratic process and based on universal adult
suffrage was emphasized. See Chayes, 11, p. 1329. The people could
choose which method of decolonization they wished to adopt. Akehurst,
p. 282.

- (b) The Assembly attempted to assume the power to interpret Article 73 of the Charter in general²³⁾ and in particular to decide whether or not a territory was non-self-governing within the meaning of that Article.²⁴⁾
- (c) Relying on the above, the General Assembly declared for the first time in 1962 that Southern Rhodesia was a non-self-governing territory within the meaning of Chapter XI of the Charter.²⁵⁾ In further consequence of, and in reliance upon, this determination, various organs of the United Nations took action. Such action is now described.
- (d) The United Kingdom was treated as the administering power with obligations under Article 73.²⁶⁾
- (e) The Assembly then made various recommendations to the United Kingdom as the "administering power" and to other bodies. It recommended that the United Kingdom convene a constitutional conference to ensure the adoption of universal adult suffrage in Southern Rhodesia;²⁷⁾ remove racial discrimination in the territory/...

23) Thus A.Res. 1514 (XV) is an attempted interpretation of the obligations in this Article. See Akehurst, p.282.

24) De Yturriaga, note 5) supra, p. 191; Chayes, 11, pp. 1325-1326.

25) A. Res. 1747 (XVI). This was followed by A.Res. 1760 (XVII). The Assembly accepted the argument that since the great majority of the people did not have political rights, one could not regard the territory as being self-governing. See Fischer, note 3) supra, p.62. See too Chayes, 11, pp. 1331-1332. Here the Assembly followed the Report of the Sub-Committee on Southern Rhodesia of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. See Chayes, 11, pp. 1324-1325; De Yturriaga, note 5) supra, p.208.

26) A.Res.1747 (XVI); A.Res. 2022 (XX). Fawcett, note 14) supra, p.108; Chayes, 11, pp. 1331-1332.

27) A Res. 1747 (XVI); A.Res. 2022 (XX).

territory;²⁸⁾ secure the release of political prisoners;²⁹⁾ allow African political activity;³⁰⁾ use force to achieve all these ends.³¹⁾ It requested the Special Committee on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples to consider whether Southern Rhodesia had attained a full measure of self-government and to report³²⁾ and to continue with its constructive efforts.³³⁾ It drew the attention of the Security Council "to the threats made by the present authorities in Southern Rhodesia, including the threat of economic sabotage against the independent African States adjoining Southern Rhodesia".³⁴⁾ It declared Southern Rhodesia to be a threat to the peace and security of Africa.³⁵⁾ Finally, it called upon all States to refrain from rendering assistance to the minority régime in Southern Rhodesia; to use all their powers against a unilateral declaration of independence, not to recognize any government in Southern Rhodesia which was not representative of the majority of the people, and to render moral and material help to the people of Zimbabwe in their struggle for freedom and independence.³⁶⁾

(f)/...

28) A. Res. 1747 (XVI); A Res. 2022 (XX).

29) A. Res. 1747 (XVI); A. Res. 1755 (XVI); A. Res. 2022 (XX).

30) Ibid.

31) Ibid.

32) A. Res. 1745 (XVI).

33) A. Res. 1747 (XVI).

34) A. Res. 2022 (XX).

35) A. Res. 1760 (XVI).

36) A. Res. 2022 (XX).

- (f) The Special Committee just referred to (hereinafter called the Colonial Committee) considered Southern Rhodesia at meetings on 15th March and 10th April, 1963.³⁷⁾ It sent a sub-committee to visit the British Government in April 1963. The British Government held discussions with the sub-committee.³⁸⁾ The sub-committee submitted a report.³⁹⁾ The view of the committee was that Southern Rhodesia was in colonial status.⁴⁰⁾ The Committee made various calls on the United Kingdom to convene a constitutional conference.⁴¹⁾ It also heard individual petitioners from Southern Rhodesia.⁴²⁾ In 1963, it renewed its attacks on the British position which asserted that Southern Rhodesia was self-governing.⁴³⁾
- (g) The Security Council also dealt with the Southern Rhodesian situation. On 14th September, 1963, the United Kingdom was invited by a motion not to transfer any power or attributes of sovereignty or any armed forces or aircraft to Southern Rhodesia until a fully representative government was established. Britain used her veto.⁴⁴⁾ On 6th May, 1965, the Security Council passed a resolution requesting United Nations members to refuse to accept a unilateral declaration of independence by the minority government, calling upon the United Kingdom not to transfer/...

37) De Yturriaga, note 5) supra, p. 207.

38) Ibid. Chayes, 11, p.1324.

39) De Yturriaga, note 5) supra, p.208.

40) John Carey, "The United Nation's Double Standard on Human Rights Complaints" (60) A.J.I L., 1966, p.792 at p.798. The Mauretanian view was that Southern Rhodesia, though not under the control of United Kingdom officials, was under the rule of settlers installed by the United Kingdom. Ibid.

41) Chayes, 11, p.1325. De Yturriaga, note 5) supra, p.208.

42) M.E.Zvolego, Rev. M.Scott, Joshua Nkomo. Ibid., p.203.

43) Chayes, 11, pp. 1332-1333.

44) Palley, p.728; Chayes, 11, p.1333.

transfer to Southern Rhodesia any of the attributes of sovereignty but to promote the attainment of independence with a democratic system of government and calling for a constitutional conference.⁴⁵⁾

The first three activities above (a) - (c) are the important ones. For if these matters do not fall within the competence of the General Assembly then it follows that the remaining activities (d) - (g) are outside the powers of the relevant organs of the United Nations since they are essentially based upon the existence of competence to perform activities (a) - (c). We may deal with the competence to define the requisites of a self-governing territory, i.e. (a) above and the power to interpret Article 73 of the Charter i.e. (b) above, together. These two "competences" have common features in that the Charter does not give the Assembly the power to do either and that initially the Assembly did not claim either power, being apparently content to allow the colonial powers to reserve these particular competences to themselves.⁴⁶⁾

The basic question here is whether the General Assembly may authoritatively interpret the provisions of the Charter and, in particular, the provisions of Article 73. There is no such power given by the Charter itself but it has been argued that the General Assembly possesses such power.⁴⁷⁾ It can be argued that insofar as a

resolution/...

45) S.Res. 202 (1965); Chayes, 11, p. 1334; Fawcett, note 14) supra, pp. 108-109.

46) De. Yturriaga, note 5) supra, pp. 191, 195.

47) See, for example, McDougal and Reisman "Rhodesia and the United Nations; the Lawfulness of International Concern" (62) A.J.I.L., 1968, p.1. at pp. 11-12; Sorensen, p.162; Samuel A.Bleicher, "The Legal Significance of Re-citation of General Assembly Resolutions" (63) A.J.I.L., 1969, p.444 at p.448 et seqq.

resolution deviates from the original meaning of the Charter it has no binding effects.⁴⁸⁾ But apart from this it has been argued that an interpretative resolution binds not only those states who vote for it and abstain from voting on it but also those who vote against it.⁴⁹⁾ The argument is that if the interpretation is a reasonable choice between various rational alternatives, a dissenting state is bound

"... it must be assumed that a state agreeing to be bound by the terms of a constitutive instrument necessarily accepts the possibility that some of the subsequent interpretations will not be those that the state would have preference...." 50)

Of course, a state must accept that adverse interpretations of its obligations may be made from time to time but that is not to say that it accepts such interpretations as being authoritative, i.e. as finally settling such matters in a judicial manner. If it were to accept this further proposition, that interpretation was to be conclusively binding, the power of judicially interpreting the instrument would have to be specifically granted to the interpreting organ by the constituent instrument. This is usually the position in constitutive instruments and so normally there can be authoritative interpretation of such instruments by the empowered organ.⁵¹⁾ But the Charter of the United Nations is a significant exception here.⁵²⁾ Nowhere does the Charter give interpretative powers to the General Assembly. From this exceptional omission of a power normally given, one is driven to the conclusion that

the/...

48) Ibid., p. 448.

49) Ibid., p. 449.

50) Ibid.

51) Sorensen, p.92.

52) Ibid.

the Assembly was not meant to interpret the Charter authoritatively and indeed has no such power. This means that interpretation of the Charter (including, of course, Article 73) by the General Assembly cannot be accepted as finally binding on states. Interpretations by the Assembly, therefore, are subject to evaluation and it always lies in the hands of a dissenting state to contest the accuracy of Assembly interpretation in any case - even if it appears reasonable.⁵³⁾

We have now come to the conclusion that under the Charter, the General Assembly had no power of authoritative interpretation. If the General Assembly is to have such a power it could only possess it by reason of a de facto revision of the terms of the Charter under which such powers were assumed with the consent or acquiescence of the affected powers.⁵⁴⁾ In the case of the power to authoritatively interpret the provisions of Article 73, the consent or

acquiescence/...

53) Reasonableness of course might indicate that an interpretation was correct - but not conclusively so. Rosalyn Higgins, The Development of International Law through the Political Organs of the United Nations, Oxford, 1963, pp. 112-113 considers however, that through a series of resolutions the Assembly may have developed the power to interpret Article 73 by determining the territories to which it applies. Such a practice would, however, it is submitted, involve a Charter revision by practice and the possibility of such revision is now discussed. The question of the repetition of resolutions as evidence of the evolution of custom (apart from the question of Charter interpretation) is discussed infra, p. 482. in relation to the possible existence of a right of self-determination.

54) On de facto revision, or modification by practice, see Brownlie, p.502; Schwarzenberger, Manual, pp. 167-168; Akehurst, pp. 244-245. It is clear, of course, that such modifications cannot be unilaterally effected (i.e. by mere General Assembly assumption of power alone in this case) and hence the requirement of consent or acquiescence by the affected powers. See Sorensen, p. 222-223.

acquiescence of the colonial powers to such assumption would, therefore, be necessary as they are the affected powers. It would appear to be quite clear that the colonial powers never consented to or acquiesced in the Assembly exercising such authoritative interpretative powers. Originally the colonial states sent lists of dependent territories on the understanding that they would reserve their rights to enlarge or reduce the lists in future.⁵⁵⁾ The competence of the Assembly to determine when a territory should be removed from the list has at all times been challenged by the governing powers who asserted that the achievement of self-government was for each governing power to determine in any case.⁵⁶⁾ When they consider self-government to be attained they simply inform the General Assembly that reports will no longer be submitted in respect of the territory.⁵⁷⁾ The competence of the Assembly to determine what is a self-governing territory has continually been challenged⁵⁸⁾ and a compromise was, at one time, achieved in the dispute under which it was acknowledged that both the Assembly and the state in question might make such a determination.⁵⁹⁾ This, of course, means that neither determination is in fact authoritative!

In our enquiry we need, of course, only concern ourselves with the question whether such assumption of authoritative interpretative powers by the General Assembly is binding by consent or acquiescence on the United Kingdom as we are only concerned to enquire whether the United Nations was entitled to treat Southern Rhodesia as a non-self-governing territory vis-à-vis the United Kingdom.

It/...

55) De Yturriaga, note 5) supra, p.191.

56) Ibid., p. 195.

57) For examples, see ibid.

58) Obed Y. Asamoah, The Legal Significance of the Declarations of the General Assembly, The Hague, 1966, p.175.

59) A. Res. 648 (VII); Fawcett, The British Commonwealth in International Law, London, 1963, p.140.

It would appear quite clear that the United Kingdom never acquiesced in the exercise of such functions by the General Assembly. On the contrary, the United Kingdom consistently protested at such assumption by the Assembly and at the various actions taken by the Assembly as a consequence.⁶⁰⁾

We must now consider the third question above - (c) - the specific interpretation of the General Assembly that Southern Rhodesia was a non-self-governing territory.⁶¹⁾ The determination here must, of course, be dependent on a general power to interpret in the General Assembly and we have submitted that such a power does not exist and, more specifically, is not binding on the United Kingdom. However, there is here an additional factor to consider. It can be said that there was a specific determination of the status of Southern Rhodesia in 1946 by tacit agreement. In 1946 the United Kingdom submitted a list of non-self-governing territories to the United Nations and the list did not include Southern Rhodesia which, in the opinion of the United Kingdom, was self-governing.⁶²⁾ The General Assembly noted but did not query the omission of Southern Rhodesia from the list thereby tacitly accepting the position adopted by the United Kingdom on the status of Southern Rhodesia.⁶³⁾ It can be argued from this that the General Assembly would be estopped from repudiating this determination even if it otherwise

had/...

60) See the speech of Sir Patrick Dean to the General Assembly in June, 1962 which precisely describes the attitude of the United Kingdom. Chayes, II, pp. 1325-1326.

61) A. Res. 1747 (XVI); A. Res. 1760 (XVII).

62) Chayes, II, p. 1327; Palley, p.728; Fawcett, note 14 supra, p.108.

63) A. Res. 66(1); Chayes, II, p.1327; Palley, p.728.

had the power to interpret generally.⁶⁴⁾ In other words, the determination made initially is binding, it has been acted upon by the United Kingdom,⁶⁵⁾ and it cannot be unilaterally rejected by the United Nations. The conduct of the United Nations over a period of some sixteen years further consolidates this original determination. For sixteen years it treated Southern Rhodesia as a self-governing territory by demanding no reports. Further, it is abundantly clear that the United Kingdom at all times regarded Southern Rhodesia as being self-governing, it did not accept that the United Nations had any interest in it, and it never accepted the specific determinations made by the General Assembly that Southern Rhodesia was non-self-governing,⁶⁶⁾ just as it never accepted the principle that the Assembly could make a binding determination of this nature either in this case or generally. Thus, the United Kingdom list of non-self-governing territories did not include Southern Rhodesia.⁶⁷⁾ It would not accept the resolutions which declared Southern Rhodesia to be non-self-governing.⁶⁸⁾ When the sub-committee of six visited Britain between 20th and 26th April, 1963, the British Government informed it that it was incompetent to intervene in the affairs of Southern Rhodesia which was self-governing but it nevertheless authorized the London visit and held discussions with the sub-committee.⁶⁹⁾ It maintained at all times that/...

64) On estoppel see Sorensen, p.148; Akehurst, pp. 189-191; O'Connell, 1, p.13; Eastern Greenland case, P.C.I.J. 1933, Series A/B, no.53 at 68; Temple of Preah Vihear case, I.C.J. Rep. 1962, 6 at 23, 31, 32, 39-51; Arbitral Award of the King of Spain, I.C.J. Rep. 1960, 192 at 209, 213; Argentina - Chile Boundary Award (61) A.J.I.L., 1967, p.1071.

65) The United Kingdom never provided information in respect of Southern Rhodesia, Chayes, II, p.1327.

66) A. Res. 1747 (XVI); A.Res. 1760 (XVII).

67) Chayes, II, p.1327; Fawcett, note 14) supra, p.108.

68) Fischer, note 3) supra, p. 62.

69) De Yturriaga, note 5) supra, p.207; Chayes, II, p.1324.

that it was not an administering authority,⁷⁰⁾ it did not provide information under Article 73⁷¹⁾ and would not admit that the United Nations had any interest in the matter.⁷²⁾ Thus it would not participate in Assembly voting on A. Res. 1747 (XVI) and was recorded as "present and not voting".⁷³⁾

In the Security Council it was prepared to veto resolutions on Southern Rhodesia and did so veto a resolution in September, 1963.⁷⁴⁾ Finally, it is clear that the United Kingdom treated Southern Rhodesian affairs as being a matter of domestic jurisdiction with which the United Nations was incompetent to intervene.⁷⁵⁾ We may therefore say that the United Kingdom has reiterated at every opportunity that Southern Rhodesia is self-governing and has denied United Nations competence in relation to the territory. From this we may conclude that the United Kingdom has never acquiesced in any changes purported to be made by the United Nations in relation to the status of the territory and thus the status of Southern Rhodesia remained right throughout the period 1946-1965 as it was initially in 1946 viz. the status of a self-governing colony to which Article 73 of the Charter was inapplicable. This conclusion is further strengthened by the following argument. If the competence of the General Assembly to determine whether or not an admittedly non-self-governing territory i.e. one which appears in the lists, remains the same, is such a matter of contention, how much more so is that competence doubtful in/...

70) Palley, p.729.

71) Chayes, II, p. 1327.

72) Palley, p.728; Chayes, II, pp. 1325, 1326.

73) Chayes, II, pp.1331-1332.

74) Chayes, II, p.1333; Palley, p.728; De Yturriaga, note 5) supra, p. 208.

75) Chayes, II, p.1330; Palley, p.728; Fawcett, note 14) supra, p. 108.

in the matter of a positive determination that a territory, not previously in the lists, should be regarded as non-self-governing?⁷⁶⁾ And how much more so is such competence in doubt in the case of a territory such as Southern Rhodesia whose omission from the lists was tacitly accepted by the General Assembly in 1946?

SECTION III.

THE EXTENT OF SOUTHERN RHODESIAN INTERNATIONAL PERSONALITY.

We have already seen that just prior to 11th November, 1965, Southern Rhodesian personality was quite extensive.¹⁾ We must now see the exact extent of such personality by considering the various headings under which such personality existed.

(1) Membership of International Organizations.

In practice, the international personality of the Federation of Rhodesia and Nyasaland devolved on Southern Rhodesia after the dissolution of the former.²⁾ Thus Southern Rhodesia succeeded in general to the membership, associate membership or participation in group membership, as the case might be, of those Commonwealth and international organizations of which the Federation had been a member.³⁾ These organizations and the type of membership existing in each have already been described.⁴⁾ As far as membership of the
Commonwealth/...

76) And yet the General Assembly made such determinations in relation to the Portuguese overseas provinces in A.Res. 1542 (XV).

1) Supra, p. 89.

2) Supra, pp. 88-89.

3) Palley, p.725; S/9853, Annex IV, pp.7, 12, 14. Before the inception of the Federation Southern Rhodesia had been a member of some of these e.g. U.P.U., I.M.F., I.B.R.D. See J.E.S. Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I L., 1965-1966, p.103 at p.106.

4) Supra, pp. 85-86.

Commonwealth itself was concerned, Southern Rhodesia could not be a full member as it was not an independent state and it did not have the status of a dominion.⁵⁾ For some purposes it was regarded as being a member of the Commonwealth but for other purposes as a dependency of the United Kingdom.⁶⁾ Thus its Prime Minister had a standing invitation to attend Commonwealth Prime Ministers Conferences not as a right but as a matter of courtesy.⁷⁾

(2) Participation in treaties.

There are four types of treaty which must be discussed here:

- (a) British treaties applied to Southern Rhodesia;
- (b) British treaties which did not apply to Southern Rhodesia but to which Southern Rhodesia could accede and did accede;
- (c) Treaties concluded by Southern Rhodesia as such;
- (d) Treaties of the Federation of Rhodesia and Nyasaland to which Southern Rhodesia succeeded.

(a) British treaties applied to Southern Rhodesia.

Southern Rhodesia had no personality in respect of these particular treaties. The United Kingdom alone was responsible for their performance and had the sole international personality in relation to them. The question of Southern Rhodesia

..... succeeding to these treaties and becoming a party to them in its own right would only arise in the event of its claim to
independence/...

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- 5) Chayes, II, p.1319; J.E S. Fawcett, The British Commonwealth in International Law, London, 1963, p.86.
 - 6) R.B.Stewart, Treaty Relations of the British Commonwealth of Nations, New York, 1939, pp. 21-22.
 - 7) Fischer, "Le Problèm Rhodesien" (11) Annuaire Francais de Droit International, 1965, p.41 at p.51; J.D B. Miller, The Commonwealth in the World, London, 1965, p.62; Sir Ivor Jennings, Constitutional Laws of the Commonwealth, Oxford, 1957, p.10; H.H.Marshall, "The Legal Effects of U.D.I." (17) I.C L.Q., 1968, p. 1022; Palley, p.365. Later no invitation was issued because of the attitude of emergent African Commonwealth Countries. See Marshall, op.cit., p. 1023. On Southern Rhodesia (and the Federation) in relation to the Commonwealth see supra, p. 86.

independence achieving validity in international law.⁸⁾

These treaties existing with many countries concern a great variety of subject matter.⁹⁾ The remaining three categories of treaty do involve international personality on the part of Southern Rhodesia and by describing them we discover the extent of such personality.

(b) British treaties to which Southern Rhodesia acceded.

Originally, all treaties of the United Kingdom applied ipso facto to all British territories and to all British subjects unless the treaty contained a provision to the contrary.¹⁰⁾

By the eighteen sixties it was realized that such treaties did not necessarily have to be automatically applicable to overseas territories such as self-governing colonies.¹¹⁾ By the eighteen eighties various devices were being utilized in practice to exclude such self-governing colonies and territories from/...

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- 8) The question of succession is discussed infra, pp.736-753 in relation to the effect of a grant of independence by the United Kingdom to Rhodesia.
- 9) A list of the important treaties applied to Southern Rhodesia will be found in The International Law Association's "The Effect of Independence on Treaties", London, 1965, pp. 66-90. A list of the important boundary treaties concluded with Portugal will be found at ibid., p.84. Many of these treaties were directly applied by United Kingdom signature alone. Others were only applied subsequently to the territory and after consultation with it. In this category we find mainly treaties of Extradition, Commercial Treaties, Treaties on Economic co-operation and some other treaties of a miscellaneous character. This category of treaty applied to the territory only after consultation with it, must be distinguished from the type of treaty to which the territory itself accedes. In the latter case, the territory itself becomes a separate and participating party (see infra, pp.107-109) with relevant international personality whilst in the former case the mother state is the party to the treaty with international responsibility for the application of the treaty in the territory. Southern Rhodesia in effect produced a list of treaties which it claimed to have inherited. See D.P.O'Connell, International Law, 1, London, 1965, p.431.
- 10) J.E.S. Fawcett, "Treaty Relations of British Overseas Territories" (26) B.Y.I.L., 1949, p.86 at p.93.
- 11) Ibid., p.94.

from the application of certain treaties, such as the practice of excluding certain territories by name but with provision of an opportunity for them to accede,¹²⁾ the practice of providing that the treaty was only to apply to such territories as were specifically named¹³⁾ and the practice of providing that treaties would not be applicable to overseas territories unless accepted by them.¹⁴⁾ If no express provisions were inserted it was a question of interpretation whether the treaty was to apply to overseas territories though the principle was that acceptance of a Convention by the United Kingdom would ipso facto make it operative in the United Kingdom and its overseas territories, unless by express provision or necessary intendment the treaty was territorially limited to the United Kingdom or to one or more of its overseas territories.¹⁵⁾

Thus the principle of separate accession to United Kingdom treaties by overseas territories arose. The principles which governed such separate participation in practice were as follows: The subject matter of the treaty in question would concern a field in which the overseas territory was self-governing, the assent of the other states parties to the treaty to such separate participation would naturally be required¹⁶⁾ and the participation would be diplomatically effected by the United Kingdom.¹⁷⁾ The territory which

_____ accedes/...

12) Ibid.,

13) Ibid., p.95.

14) Ibid., p.96.

15) Ibid., p. 101.

16) This assent would of course be evident from the terms of a treaty which made provision for separate accession.

17) Fawcett, note 10) supra, p.106.

accedes to such a treaty becomes a separate party to the treaty and it is no less essentially a party to the treaty merely because its acceptance is formally communicated by the metropolitan power.¹⁸⁾

In practice, separate accession would be provided for where the subject matter concerned was an administrative or technical matter in which the colony was self-governing.¹⁹⁾ In relation to extradition treaties it has been the practice since the First World War to make provision for separate accession by dominions and self-governing colonies.²⁰⁾ Great Britain ceased to include self-governing colonies within the ambit of commercial treaties as early as 1880.²¹⁾ Thus Southern Rhodesia became a separate party apart from the United Kingdom to various treaties being the constituent instruments of international organizations,²²⁾ to the G.A.T.T.²³⁾ and to certain protocols made under the G.A.T.T.²⁴⁾

(c)/...

18) Ibid., p. 102.

19) Ibid., p. 106.

20) Robert E. Clute, "Law and Practice in Commonwealth Extradition" (8) American Journal of Comparative Law, 1959, p.8 at p.16.

21) Ibid.

22) Supra, pp. 85-86, 105.

23) Fawcett, note 10) supra, p. 102; Chayes, II, p.1319. Its separate participation in the G.A.T.T. is particularly significant in that the G.A.T.T. takes the attitude that a state can only be a member if it possesses full autonomy in the conduct of its external affairs. Broderick, "Associated Statehood - A New Form of Decolonization" (17) I.C.L.Q., 1968, p.368 at p.395, considers that the degree of autonomy required is doubtful because of the Southern Rhodesian precedent.

24) The formalities of participation were, of course, executed by the United Kingdom at the request of Southern Rhodesia. See Fawcett, note 10) supra, p.102.

(c) Treaties concluded by Southern Rhodesia as such.

The competence of Southern Rhodesia included, as we have seen, the right to conduct all negotiations and agreements with foreign countries subject to the need to safeguard the United Kingdom's international responsibilities.²⁵⁾ Thus on the dissolution of the Federation of Rhodesia and Nyasaland, a former extradition treaty was continued by exchange of notes between South Africa and Southern Rhodesia. This was, in effect, a new treaty to continue the application of a former one.²⁶⁾ In 1965, South Africa and Rhodesia formally concluded a treaty of extradition.²⁷⁾ Southern Rhodesia negotiated a commercial agreement with Japan without making use of United Kingdom instrumentalities.²⁸⁾ Southern Rhodesia also concluded agreements with Commonwealth countries.²⁹⁾ Such agreements were strictly speaking not treaties as the intention to conclude an agreement to which international law would apply would/...

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- 25) Supra, pp. 83, 84, 88-89. ; Fawcett, note 3) supra, p. 105; Broderick, note 23) supra, p. 378.
- 26) S. v. Bull, 1967 (2) S.A. 636 (T); S. v. Eliasov, 1964 (4) S.A. 583 (A.D.); S. v. Eliasov, 1965 (2) S.A. 770 (T); C.J.R. Dugard, "The Signing and Ratification of Treaties", Annual Survey of South African Law, 1967, at pp. 49, 51. The Exchange of Notes was held not to be a treaty of extradition in South African municipal law because it did not comply with the provisions of s.2. of the Extradition Act No. 67 of 1962. R.H.C. "State Succession to Treaty Rights" (5) Rhodesia L.J. 1965, p.56 at p. 58. This would not, of course, affect its validity as a treaty in international law.
- 27) Proclamation R151 dated 25th June, 1965, Government Gazette, (South Africa). This treaty was held to be valid in South African municipal law in S. v. Eliasov, 1967 (2) S.A., 423 (T). It also concluded commercial and double taxation agreements with South Africa. O'Connell, note 39) infra, pp. 175, 176.
- 28) Broderick, note 23) supra, pp. 378. After the dissolution of the Federation, a series of economic agreements were signed between Rhodesia and Portugal, further tightening relations between the two countries. The Times, 12th November, 1965, p. 8(e).
- 29) For example, the Commonwealth Telegraphs Agreement concluded between the United Kingdom, Canada, Australia, South Africa, India and Southern Rhodesia. See Fawcett, note 10) supra, p.105.

would usually be excluded by the application of the inter se doctrine in such cases.³⁰⁾

- (d) Treaties of the Federation of Rhodesia and Nyasaland to which Southern Rhodesia succeeded.

The Federation was a limited international person with a limited treaty-making capacity.³¹⁾ On dissolution it ceased to exist and the question whether its treaties devolved on the former constituent members of the Federation, and if so, to what extent, arose. Though the Federation was not an independent state, the succession problem is precisely the same in principle³²⁾ as would arise on the dissolution of an independent Federal State.³³⁾ Thus we consider the principles which apply in the case of the dissolution of a federation.

There are different criteria which are of relevance in determining whether the treaties of a federation devolve after its dissolution. In the first place, continuity of identity between the former constituent states of the federation and the newly emerging/...

30) Ibid. On the inter se doctrine and its scope, see Fawcett, note 5) supra, pp. 144, 175-176, 194.

31) Supra, pp. 83, 84; S. v. Eliasov, 1965 (2) S.A. 770(T) at 773.

32) Though the problem is similar in principle, the degree of succession would naturally be much less for the simple reason that a non-independent state such as the Federation was, would have negotiated far fewer treaties than an independent state because of its limited international personality and treaty-making capacity. There would thus be far fewer treaties to devolve upon its constituent members. The principles which would govern the devolution of such treaties would, however, be similar to those governing the devolution of the treaties of an independent federal state.

33) C.J.R. Dugard, "Succession to Federal Treaties on the Dissolution of a Federation" (82) S A.L.J., 1965, p.430 at p.436.

emerging units may give rise to succession.³⁴⁾ The question of the intentions of the parties also plays an important part and here the intentions of both the original parties and the "successors" are relevant in determining the question of succession.³⁵⁾ In addition, state practice in general would appear to favour the devolution of such treaties.³⁶⁾ There is a considerable, if not unanimous body of juristic opinion in favour of such devolution and there may in fact be said to be a general tendency in favour of continuance of extradition treaties.³⁷⁾ The Federation of Rhodesia and Nyasaland concluded various trade and customs agreements,³⁸⁾ visa and double taxation agreements,³⁹⁾ and an extradition agreement with South Africa.⁴⁰⁾

Taking into account the general tendency in favour of the continuity of federal treaties and the continuity of identity in/...

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- 34) Ibid. Dugard asserts that continuity of personality is the key to the whole question of succession and if the personalities of the constituent states were not materially affected, succession occurs. Ibid., pp. 431-432 and "Succession to Federal Treaties Revisited" (84) S.A.L.J., 1967, p.250 at p.254. It would appear that what Prof. Dugard means here is that where there has not been a material change in the constitutional personality of constituent states, succession takes place on dissolution of the federation. For it would appear to be apparent that if the federation was an international person, then substantial changes in international personality must take place on its dissolution.
- 35) Dugard, note 34) supra, p.252; Palley, p.725; R.H.C. note 26) supra, p.57; S. v. Eliasov, 1965 (2) S.A. 770 (T) at 773; S. v. Bull, 1967 (2) S.A. 636 (T); S. v. Devoy, 1971 (3) S.A. 899 (A.D.) at 906.
- 36) Dugard, note 33) supra, p. 436; S. v. Devoy, 1971 (3) S.A. 899 (A.D.) at 904.
- 37) Ibid., at 904F - 905A, 905H.
- 38) Fawcett, note 3) supra, p.106. Supra, p. 84.
- 39) D.P.O'Connell, State Succession in Municipal Law and International Law, 1967, pp. 176-177. Supra, p.84.
- 40) Proclamation R.44 dated 15th March 1963, Government Gazette Extraordinary (South Africa).

in the case of Southern Rhodesia after the dissolution of the Federation⁴¹⁾ it is submitted that federal treaties devolved in principle on Southern Rhodesia unless some specific reason⁴²⁾ exists in individual cases which would preclude such devolution. This is what has happened in practice. Generally, federal treaties were continued in force by all the three territories and after independence by Malawi and Zambia but separate consideration must still be afforded to each particular agreement.⁴³⁾ The result is that though there is a presumption of succession, no universal rule can be laid down and in the last analysis "each case must ... be decided upon the particular facts relating to it."⁴⁴⁾

Individual treaties have been considered. In relation to the double-taxation and visa agreements no uniform policy would appear to be followed in relation to their devolution.⁴⁵⁾ The devolution of the extradition agreement of 1963 with South

Africa/...

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- 41) Dugard, note 33) supra, p. 436 submits, and with respect, correctly, that such continuity is present in the case of Southern Rhodesia. If continuity was not present then a "new" state would have emerged from dissolution of the federation and the rules relating to state succession would apply. (Discussed infra, pp. 736-753). But even here there is a tendency to regard extradition treaties as automatically devolving. Dugard, note 33) supra, pp. 433-434 cites cases which support this tendency but points out that P. O'Higgins "Irish Extradition Law and Practice" (34) B.Y.I.L., 1958, p. 298 says this is only a judicial tendency and whether there is any applicable rule of international law is doubtful.
- 42) Dugard, note 33) supra, p. 436 says that succession should be presumed.
- 43) O'Connell, note 39) supra, p. 175. In fact the general view taken by the Government of Southern Rhodesia was that except where practical considerations would exclude succession, existing treaties, rights and obligations of the Federation would pass without resort to any positive processes of affirmation. See O'Connell, note (152) supra, p. 174.
- 44) Per Ogilivie Thompson, C.J. in S. v. Devoy, 1971 (3) S.A. 899 (A.D.) at 905 G-H.
- 45) O'Connell, note 39) supra, pp. 176, 177; S. v. Devoy, 1971 (3) S.A. 899 (A.D.) at 905E.

Africa has been judicially considered. In S. v. Eliasov,⁴⁶⁾ the extradition treaty was held not to devolve on Southern Rhodesia. In S. v. Bull,⁴⁷⁾ however, the same treaty was held to devolve upon Malawi. The court distinguished S. v. Eliasov on the grounds that both South Africa and Southern Rhodesia had intended the treaty to come to an end and this was evidenced by the fact that they had entered into a new treaty by exchange of notes to revive the old.⁴⁸⁾ On the other hand in casu the parties intended to keep the treaty in force.⁴⁹⁾ Such intention on the part of Malawi was evidenced by the constitutional steps taken to ensure that the agreement continued in force after dissolution of the Federation as the law of Nyasaland and as the law of Malawi after its achievement of independence.⁵⁰⁾ In this way continuity and thus succession was ensured.⁵¹⁾ South Africa's intention to keep the treaty in force and thus to achieve continuity and succession was apparent from the official attitude of the Government as reflected in an executive certificate signed by the Minister of Justice, Police and Prisons that it was their wish that the agreement should continue in force.⁵²⁾ In S. v. Devoy, the Appellate Division confirmed the devolution of the treaty on Malawi and confirmed the reasoning of the court in S. v. Bull.⁵³⁾

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46) 1965 (2) S.A. 770 (T).

47) 1967 (2) S.A. 636 (T).

48) At 637G-638E. Dugard, note 26) supra, p.51; Note 34) supra, p.252.

49) At 640.

50) Extradition of Offenders Enactments (Adaptations and Modifications) Regulations, 1964; Malawi Independence Order, 1964.

51) S. v. Bull, 1967 (2) S.A. 636(T) at 640.

52) Ibid., 637, 640.

53) 1971 (3) S.A. 899 (A.D.) at 908.

It would thus appear that the court in S. v. Eliasov refused to apply the general principle that a federal state's treaties devolve on the constituent members of the federation on the grounds that such succession was excluded in casu by a specific intention on the part of the "successors". Finally, we may add that the intentions of the original parties to the treaty (i.e. the Federation and the outside state) may also be relevant in relation to succession. If the original intention in concluding a treaty with the Federation had been to contract with a dependency for which Britain was internationally responsible, the treaty would continue to bind the constituent states as dependencies. If, however, the intention was solely to contract with the Federation then the treaty might require re-negotiation with the individual territories.⁵⁴⁾ There is much to be said for the emphasis on original intention here. There seems to be some juristic inconsistency in determining whether succession has taken place in the light of the intentions of the "successors".⁵⁵⁾ Logically such intention should only be relevant in determining whether there is a new treaty between the "successors", the effect of which is to continue the operation of the old one.⁵⁶⁾ The emphasis on original intention here, however, has the additional merit of taking into account the unusual position of the Federation of Rhodesia and Nyasaland which was in effect a dependency though with a limited international personality.

(3)/...

54) Palley, p.725; O'Connell, "State Succession and Entry into a composite Relationship" (39) B.Y.I.L., 1963, p.54 at p.128. O'Connell, note 39) supra, p.174.

55) This difficulty was referred to but not disposed of in S. v. Bull, 1967 (2) S.A. 636 at 638B-D.

56) As in S. v. Eliasov, 1965 (2) S.A. 770(T).

(3) Diplomatic Rights.

Southern Rhodesia was allowed to exchange High Commissioners with Commonwealth countries and did so.⁵⁷⁾ This amounted to giving its representatives diplomatic status as the office of High Commissioner gradually became assimilated to that of diplomatic representative. In 1948 the Commonwealth Prime Ministers agreed in conference that the status of Commonwealth representatives should be assimilated to that of foreign envoys.⁵⁸⁾ High Commissioners were then given the rank of Ambassadors and Diplomatic Immunities legislation applied to them.⁵⁹⁾ Such legislation even applied in terms to Southern Rhodesia as such. Thus the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952⁶⁰⁾ applies to Southern Rhodesia. This equation of Southern Rhodesia with the independent dominions and the Republic of Ireland - a sovereign republic outside the Commonwealth - shows that Southern Rhodesia's representatives had full international law status.⁶¹⁾ As far as foreign countries were concerned it had the right to appoint representatives to the diplomatic staffs of H.M. embassies and it did so appoint representatives to the British Embassies in Washington, Tokyo, Lisbon and Bonn.⁶²⁾ These were not, of course, independent missions. It also maintained consular representation in Mozambique,⁶³⁾ but its attempts to appoint a representative with independent diplomatic status in Lisbon in July 1965 finally failed when the Portuguese Government recognized/...

57) Fawcett, note 5) supra, pp. 198, 199.

58) Ibid., p. 198.

59) Ibid., pp. 198-199.

60) 15 & 16 Geo. 6 & 1 Eliz. 2, C.18. See too the New Zealand legislation. Fawcett, note 5 supra, p.199.

61) See R.Y.Jennings, "The Commonwealth and International Law" (30) B.Y.I.L., 1953, p.320 at p.322.

62) Fawcett, note 3) supra, pp. 105-106; Palley, p.725.

63) Fawcett, note 3) supra, p.106.

recognized Britain's responsibility for Rhodesian diplomatic representation in foreign countries.⁶⁴⁾ Southern Rhodesia was, however, permitted to have an Accredited Diplomatic Representative in the Republic of South Africa. According to the Commonwealth Secretary, Mr. Arthur Bottomley, the appointment of such a representative to a foreign country was no precedent. It had historical reasons in that Southern Rhodesia was represented in South Africa when the latter was a member of the Commonwealth. When South Africa left the Commonwealth,⁶⁵⁾ Britain did not find it necessary to make any change in the situation.

(4) International Responsibility.

To the extent that a colony has capacity to undertake obligations it may attract the application of rules of law and international responsibility to itself and its delinquencies here may not be the responsibility of the parent state.⁶⁶⁾ Within the sphere of its⁶⁷⁾ international personality, which was in effect that of the Federation, Southern/...

64) Ibid.; Palley, pp. 725-726. It is arguable however that Southern Rhodesia may have actually had the right to appoint an independent diplomatic mission in Lisbon despite the objections of the United Kingdom. The entrustment made to the Federation in 1957 included 'the right to appoint its own diplomatic agents, who will have full diplomatic status and who will be in charge of Federal missions, in any foreign countries prepared to accept them, and to receive such agents from other countries'. (See supra, p. 83. This entrustment probably devolved on Southern Rhodesia on the dissolution of the Federation. (See supra, pp. 88-89. This was, in effect, the argument of the Rhodesian Minister of External Affairs. See Palley, pp. 725-726. On the other hand, it can probably also be argued that as Southern Rhodesia was a dependency of the United Kingdom, the limited entrustment made to it could probably be prospectively withdrawn by the United Kingdom but not of course retrospectively so as to prejudice third states who had already acquired rights against Southern Rhodesia in reliance on such entrustment. See however, Broderick, note 23) supra, p. 378 who poses the question whether such entrustment, once made, can be revoked.

65) H.C. Debates, Vol. 717, col. 469, 28th July, 1965; Palley, p. 725.

66) Sorensen, p. 262.

67) Supra, pp. 88-89.

Southern Rhodesia could, therefore, incur responsibility to other states. Thus if matters such as the Indian complaints concerning treatment of its diplomats and the question of intervention in Katanga arose after 1963 Southern Rhodesia would have had the same capacity for incurring responsibility in these cases as the erstwhile Federation.⁶⁸⁾

(5) Capacity to protect nationals.

Originally Southern Rhodesia did not have a separate nationality. Southern Rhodesian citizenship was first created by the Southern Rhodesian Citizenship and British Nationality Act, 1949.⁶⁹⁾ This was repealed in 1958 after the Citizenship of Rhodesia and Nyasaland and British Nationality Act, 1957⁷⁰⁾ was enacted by the Federal Legislature. This Act ceased to apply by virtue of the Federal Laws (Cesser) Order, 1963⁷¹⁾ made in terms of Section 2 (2) of the Federation of Rhodesia and Nyasaland (Dissolution) Order-in-Council 1963.⁷²⁾ A new Citizenship of Southern Rhodesia and British Nationality Act⁷³⁾ was enacted by the Southern Rhodesian Legislature in 1963.

Citizens of Southern Rhodesia were also British subjects in terms of Section 1 (3) of the British Nationality Act, 1948.⁷⁴⁾ It was however, the local citizenship which counted primarily in the international law sense and thus the local state is the state with the primary/...

68) Supra, pp. 87-88.

69) No. 13 of 1949.

70) No. 12 of 1957.

71) S.R.G N. No. 786 of 1963.

72) S.L. 2085 of 1963.

73) No. 63 of 1963.

74) 11 and 12 Geo. 6, C. 56.

primary right of protection against foreign states.⁷⁵⁾ In practice, however, the United Kingdom afforded protection to the holders of Southern Rhodesian passports when abroad.⁷⁶⁾

One question of an incidental nature remains to be considered here. Did the United Kingdom have a right to protect Southern Rhodesian citizens against third states on the ground that they were also British subjects? Clive Parry⁷⁷⁾ considers that this is a possibility because of United Kingdom control over the foreign affairs of Southern Rhodesia. He points out that the United Kingdom still plays a role in the foreign affairs of some Commonwealth countries and recalls the I'm Alone claim⁷⁸⁾ which was presented by the United Kingdom on behalf of Canada at a time when the latter had already achieved such a hallmark of international personality as independent membership of the League of Nations. He further points out that it is still the practice of the United Kingdom missions to represent Commonwealth countries in territories in which they have no separate missions.

In conclusion, it may be stated that the United Kingdom would have had an undoubted right in international law to protect an individual who was both a citizen of the United Kingdom and Colonies and of Southern Rhodesia, against foreign states.⁷⁹⁾

PART II/...

- 75) Jennings, note 61) supra, p.346. Southern Rhodesia was placed in the same position as a Dominion in being allowed to pass her own citizenship and nationality laws. This was an unusual step in relation to a state which was not a Dominion. Palley, p.564.
- 76) Palley, p. 737.
- 77) "Plural Nationality and Citizenship with Special Reference to the Commonwealth" (30) B.Y.I L., 1953, pp. 244 at p.280.
- 78) (1933), Ann. Dig., 1933-1934, Case No. 86.
- 79) For the cases in which dual United Kingdom - Southern Rhodesia nationality can arise see Parry, note 77) supra, p.288. See too Palley, p. 735.

PART II

RHODESIA SINCE THE UNILATERAL DECLARATION OF INDEPENDENCE

CHAPTER III

THE STATE OF RHODESIA

SECTION I

THE UNILATERAL DECLARATION OF INDEPENDENCE.

On the 11th of November, 1965 the Government of Southern Rhodesia made a Unilateral Declaration that Rhodesia was an independent state.¹⁾

Three questions arise for separate discussion in relation to this Declaration viz. its nature, its lawfulness and its legal effect. In discussing these aspects the Declaration will be viewed from the point of view of international law and its constitutional law aspects will only merit such treatment as may be necessary for the purposes of elucidating the international law position.²⁾

(1)/...

- 1) Proclamation No. 53 of 1965, Rhodesian Government Notice 737 N/65 (1965). For the text of the Declaration see Chayes, II, pp. 1313-1315.
- 2) Constitutional law is of course municipal law and as such contrasts with international law. Municipal law (including constitutional law) can be reduced simply to facts which are either in conformity with international law or which infringe it. See Scharzenberger, Manual, p.48; Briggs, p.60; Case of Certain German Interests in Polish Upper Silesia (Merits) (1926) P.C I.J., Ser. A, No.7; Starke, pp. 96-97. This doctrine is sometimes termed as the "supremacy" or the "primacy" of international law. There are, however, contrary views. See Starke, pp. 79-81. Thus it is apparent for instance that an act might be unlawful in constitutional law without bearing a similar stigma in international law. The converse is also apparent in that a provision of constitutional law might contravene international law. There is, therefore, no necessary connection between the two systems. As Schwarzenberger, Manual, p.55 points out, subjects of international law do not necessarily concern themselves with the constitutionality of domestic activities. However, there are points of contact between the systems where each may become relevant in the application of the other. It is only at such "points of contact" that constitutional law will receive attention in this work.

(1) The nature of the Declaration.

From a constitutional law point of view the Declaration in essence purported to achieve two things.

- (a) It purported to establish Rhodesia as an independent state. This is clear from the conduct and statements of the Prime Minister of Rhodesia, from the terms of the Unilateral Declaration and from the contents of the Constitution of Rhodesia, 1965 which was annexed to the Declaration.

In the period shortly after the Unilateral Declaration Mr. Smith is reported as saying that Britain no longer had any power over Rhodesia, that the Governor Sir Humphrey Gibbs no longer had power and that in fact Rhodesia no longer had a Governor.³⁾ He also wrote to Her Majesty the Queen on behalf of the Ministers of the Government of Rhodesia asking for the appointment of Mr. Clifford Dupont as Governor-General under section 3(2) of the 1965 Constitution.⁴⁾

The Unilateral Declaration itself stated.

"...the Government of Rhodesia ... consider it essential that Rhodesia should attain without delay, sovereign independence ... NOW, THEREFORE, WE, THE GOVERNMENT OF RHODESIA ... DO, by THIS PROCLAMATION, adopt, enact and give to the people of Rhodesia the Constitution annexed hereto."

The 1965 Constitution refers to the attainment of sovereign independence by Rhodesia.⁵⁾ The Constitution also makes the following provisions. Executive government in regard to any

aspect/...

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- 3) The Times, 13th November, 1965, p.10(a); 16th November, 1965, p. 12 (a).
4) The Times, 3rd December, 1965, p.12 (b).
5) S. 143.

aspect of internal or external affairs is vested in Her Majesty acting on the advice of the Ministers of the Government of Rhodesia and may be exercised by the Officer Administering the Government as the representative of Her Majesty.⁶⁾ Provision was made for the appointment of the Officer Administering the Government by the Executive Council.⁷⁾ The Officer acts on the advice of the Ministers of the Government of Rhodesia save where he has a discretion.⁸⁾ H.H. Marshall considers that the independence of Rhodesia is to some extent called in question in that the Queen had executive powers but declined to act. The Officer Administering the Government did not represent anyone and could not therefore be advised to act.⁹⁾ D.B.Molteno says that the vesting of executive power in the Queen is no more inconsistent with Rhodesian independence than similar provisions in the contemporary constitutions of Canada or Australia or in the former South Africa Act after the Statute of Westminster 1931, that the executive power is exercisable by Her Majesty or by the Officer Administering the Government.¹⁰⁾ It is submitted that the view expressed by Molteno is preferable.

Legislative/...

6) S. 47.

7) S. 3(1)(b)

8) S. 4.

9) H.H. Marshall, "The Legal Effects of U.D.I." (17) I.C.L.Q., p.1022 at p. 1033.

10) Molteno, p. 426.

Legislative power is bestowed by Section 26. Under it Parliament is given power to make laws for the peace, order and good government of Rhodesia.¹¹⁾ No Act of the United Kingdom is to extend to Rhodesia unless extended thereto by an Act of the Rhodesian Legislature.¹²⁾ The Colonial Laws Validity Act, 1865 is not to apply in future.¹³⁾ No future law is to be void on the ground that it is repugnant to the law of England or a future Act of the United Kingdom Parliament and the Rhodesian legislature may repeal or amend any such United Kingdom Act.¹⁴⁾

The Legislature of Rhodesia was thus endowed by section 26 with sovereign legislative powers in terms clearly modelled in part on the Statute of Westminster, 1931 and in part on the Status of the Union Act, 1934.¹⁵⁾ There is nothing in the 1965 Constitution corresponding to section 111 of the 1961 Constitution which made certain reservations in favour of the United Kingdom Government.¹⁶⁾ There is nothing in the 1965 Constitution corresponding to section 105 of the 1961 Constitution which prohibited the Southern Rhodesian legislature from legislating on these topics. Indeed the legislative powers conferred by section 26 are clearly inconsistent with any such reservations in favour of the United Kingdom or prohibitions on the Rhodesian legislature.¹⁷⁾ Nor is there anything

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11) S. 26(1).

12) S. 26(3).

13) S. 26(4).

14) S. 26(5).

15) Molteno, pp. 426-427.

16) Ibid., p. 427.

17) Ibid.

in the 1965 Constitution reserving the limited power of disallowance embodied in section 32 of the 1961 Constitution to the United Kingdom Government.¹⁸⁾ On the contrary the existing Constitution of 1961 was repealed in toto by the 1965 Constitution¹⁹⁾ which also provided that no enquiry was to be made into the validity of the 1965 Constitution.²⁰⁾ Thus the 1965 Constitution did not recognize any of the erst-while limitations in favour of the United Kingdom.²¹⁾

- (b) The Unilateral Declaration, to which the 1965 Constitution was annexed, purported to increase the powers of the Legislature.

The 1961 Constitution entrenched certain provisions, regarded as fundamental, such as civil rights contained in the "Declaration of Rights" and certain other matters.²²⁾ These could not be removed or amended by the Legislative Assembly alone.²³⁾

The 1965 Constitution repealed the 1961 Constitution.²⁴⁾ Under it there is no provision which the Legislature cannot amend.²⁵⁾ The power to legislate is only restricted by procedural requirements which the Legislature had to observe in relation to legislation concerning the franchise²⁶⁾ and constitutional/...

18) Ibid.

19) S. 2.

20) S. 142.

21) R.H.Christie, "Practical Jurisprudence in Rhodesia" (1) C.I.L.S.A., 1968, p.390 and (2) C.I.L.S.A., pp.3, 206 at p.207.

22) See supra, pp. 12, 16; Molteno, p. 262.

23) For the amending procedure see supra, p. 12; Molteno, p.262.

24) S. 2.

25) S. 114.

26) S. 15.

constitutional amendments.²⁷⁾ Even these were subject to the important exceptions relating to Acts of Indemnity.²⁸⁾ Thus while the 1965 Constitution purported to "specially" entrench provisions which corresponded to those in the 1961 Constitution, the entrenchment was fundamentally different in that the 1965 Constitution did not recognize the erstwhile limitations on the powers of the Legislature.²⁹⁾

The above were the main changes which the Unilateral Declaration purported to bring about. The organs which purported to achieve these results were clearly incompetent to do so in terms of existing constitutional law. The Government of Southern Rhodesia made the Unilateral Declaration in which they purported to adopt and enact the 1965 Constitution. Under the 1961 Constitution they had no authority to enact legislation and a fortiori to repeal the Constitution itself. The 1965 Constitution was later confirmed and ratified by the Legislature.³⁰⁾ It would appear to be clear however that the Legislature's adoption of this new Constitution was also in excess of their legislative powers.³¹⁾ In the first place the Legislature could not have effected the amendment of the "specially" entrenched clauses in the 1961 Constitution or altered those provisions which made reservations in favour of the/...

27) S. 114-117.

28) S. 114, 143.

29) Madzimbamuto v. Lardner-Burke, N.O., 1968 (2) S.A. 284 (R., A.D.) at 303; Molteno, pp. 262-263; Christie, note 21 supra, p.207.

30) Constitution (Ratification) Act, 1966.

31) Molteno, p. 286.

the United Kingdom Government.³²⁾ To the extent to which the 1965 Constitution purported to bring about such alterations it was invalid in terms of the existing law and ratification by the Legislature could not validate it. In the second place the constitutional competence of the Rhodesian Legislature to make any law at the time was seriously open to question. Thus its purported ratification of the 1965 Constitution was probably entirely invalid in terms of the existing constitutional law. In terms of Section 3(1) of the Southern Rhodesia (Constitution) Order, 1965³³⁾ made under the provisions of Section 2(1) of the Southern Rhodesia Act, 1965,³⁴⁾ the Legislature of Southern Rhodesia was prohibited from making laws.³⁵⁾

In the light of what we have said the Unilateral Declaration can only be described as being a constitutional revolution and has been so described.³⁶⁾ The organs which brought about the revolution/...

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- 32) Supra, p. 12. Nor could it remove the residual power of the United Kingdom Parliament to legislate for Rhodesia or repeal the Colonial Laws Validity Act as it purported to do in Section 26 of the 1965 Constitution. See Molteno, pp. 261, 282-283.
- 33) S.I. 1952 of 1965.
- 34) An Act of the United Kingdom Parliament.
- 35) Molteno, pp. 285-289 discusses the validity of this Act and Order in the light of the Convention against the United Kingdom legislating for Rhodesia save with the consent of the Government of Rhodesia. (Supra, pp. 18-19). He concludes (p. 289) that the applicability of the Convention was a matter for decision by the British Government alone, and the introduction of the legislative measures in question amounted to a decision by that Government that the Convention was non-applicable in the aftermath of U.D.I. This decision was not justiciable by the courts. Hence the 1965 Act and Order-in-Council were validly part of the law of Rhodesia. See too Molteno, p. 405. Sed contra MacDonald, J.A. in R. v. Ndlovu, 1968 (4) S.A. 515 (R., A.D.) at 552-553.
- 36) See for example the views expressed by Sir Elwyn Jones, the British Attorney-General, The Times, 13th November, 1965, p. 6 (f); Beadle, C.J. in Madzimbamuto v. Lardner-Burke N.O., 1968 (2) S.A. 284 (R., A.D.) at 302; Molteno, p. 263. Christie, note 21 supra, p. 391 describes it as a "bloodless revolution". H.R. Hahlo, "The Privy Council and the 'Gentle Revolution'" (86) S.A.L.J., 1969, p. 419.

revolution were the Government, with the support at least of important and powerful elements among the public and later the Legislature, which, as we have seen, purported to ratify the 1965 Constitution which the Government had "enacted".³⁷⁾

The revolution which occurred was in fact a twofold revolution.

(a) It was a revolt against the United Kingdom. It has therefore been described as a revolution against the residual powers of the United Kingdom,³⁸⁾ a rejection of the connection with the United Kingdom³⁹⁾ and a usurpation of the powers of the United Kingdom Government and Parliament.⁴⁰⁾ Thus it purported to remove the residual sovereignty of the United Kingdom completely by erasing provisions such as sections 32 and 111 of the 1961 Constitution which contained the power of disallowance and reservation in favour of the United Kingdom Government respectively and by enacting section 26 of the 1965 Constitution to remove the legislative powers of the United Kingdom Parliament.⁴¹⁾ In effect the revolution was/...

37) Molteno, pp. 274, 286, 288; Christie, note 21 supra, p. 391. A.J.G. Lang, "Madzimbamuto and Baron's case at First Instance" (5) Rhodesia L.J., 1965, p. 65 at p. 107 says that only the governing party in Parliament was a party to the revolt. H. Kelsen, General Theory of Law and the State, New York, 1961, p. 117 points out that it is irrelevant whether the revolution is effected by a mass movement or through action by those in government positions.

38) Christie, note 21 supra, p. 391.

39) "... a final and formal rejection of the tenuous British connection" W.P. Kirkman, "The Rhodesian Referendum - the Significance of June 20, 1969" (45) International Affairs, 1969, p. 648.

40) Sir Elwyn Jones, British Attorney-General, regarded it as such. The Times, 13th November, 1965, p. 6 (f). See too B.A. Hepple, P.O. Higgins, C.C. Turpin, "Rhodesian Crisis - Criminal Liability", Criminal Law Review, 1966, p. 5 at p. 6. See too Palley, pp. 751-753.

41) Molteno, pp. 426, 427.

was brought about by the retention of power through an act of usurpation by legitimate government.⁴²⁾ The United Kingdom immediately retaliated by dismissing the Rhodesian Government through the Governor.⁴³⁾ The Rhodesian Government continued in office despite this, and this retention of power by a dismissed government must be regarded as a further aspect of the overall revolution against the authority of the United Kingdom.

- (b) It was a revolt against the people of Rhodesia being a usurpation at their expense. Their rights, which were entrenched against legislative interference under the 1961 Constitution, were no longer so entrenched and the change was brought about in a manner which was not consistent with the existing law.⁴⁴⁾ Molteno regards this usurpation at the expense of the people as being of the essence of the revolution rather than the revolt against the United Kingdom's powers which he regards as being of a more formal nature.⁴⁵⁾ This usurpation at the expense of the people was an "internal" revolution but as far as constitutional law is concerned, it was, as Molteno points out, the substance of the revolution. Being an "internal" revolution, it was not however the substance of the revolution from an international law point of view. From that point of view of international law this "internal" revolution at the expense of the people is superfluous for it has nothing to do with the independence of Rhodesia.⁴⁶⁾ On the other hand the revolution/...

42) Molteno, p. 276.

43) The Times, 12th November, 1965, p. 12(a),

44) Molteno, pp. 262-263, 265; Palley, pp. 754-756.

45) Ibid. pp. 264-265.

46) Molteno, p. 263 points out that fundamental though this "internal" departure from the 1961 Constitution was, it did not affect Rhodesia's independence. See ibid., p. 260.

revolution against the United Kingdom is crucial to the existence of Rhodesian independence.

From an international law point of view the Declaration can also be interpreted as an attempt to achieve two results.

(1) The alteration of the status of the territory. Prior to 11th November, 1965 Southern Rhodesia was a British Dependency with primary international personality in the United Kingdom.⁴⁷⁾ The Declaration attempts to alter this by the constitution of Rhodesia as an independent state for international law purposes. In effect it is a statement by an entity that it regards itself as a fully sovereign state in international law, that it renounces any form of foreign control and that henceforth it intends to guide its own destiny and will brook no outside interference either in its domestic affairs or in its relations with other sovereign states. It is simply a statement of fact for the information of other subjects of international law and it is therefore submitted that it is in essence the employment of the device of notification.⁴⁸⁾ It is the notifying of other subjects of international law of a new state of affairs which these other subjects of international law may or may not consider opposable by them. The notification anticipates that the notified factual situation will be recognized by other subjects of international law and thus acquire a legal basis in that system.⁴⁹⁾ (11) The constitution of the Government and/...

47) See supra, p. 90.

48) See the writers "Status of Rhodesia in International Law", Acta Juridica, 1967, at p.39. On the device of notification see Schwarzenberger, Manual, p.69; Oppenheim, I, pp. 788-789.

49) It can in fact be construed as a request for such recognition. See Whiteman, II, p. 48. See too the discussion of the United States' Declaration 1776 and the Dutch Republic's Act of Abdication, 1581 as addresses to the world in general in A.P. Rubin, "Tibet's Declaration of Independence" (60) A.J.I.L., 1966, p. 812.

and other organs of state with powers as provided for in the 1965 Constitution as the Government and organs of state of the newly independent state. Again, it is submitted, that the device of notification has been employed here. A new factual situation viz. the creation of a new governmental structure for a newly independent state, has been brought to the attention of other subjects of international law. This again anticipates that the new government will be recognized internationally and will thus acquire a legal basis in that system.

The essence or nature of the Unilateral Declaration will emerge from the above. It is in fact the making of a claim - or a two-fold claim. In the first place a claim is made that Rhodesia is an independent state and in the second place a claim is made that the Government constituted by the 1965 Constitution is entitled to represent and commit that newly declared independent state.

(2) The Effect of the Declaration.

We have just pointed out that the Unilateral Declaration of Independence was merely the making of a claim to new territorial status and new representative capacity in international law. In itself therefore the claim cannot achieve the desired result. It may be an unsuccessful claim. Something additional is required before the desired result can be achieved and that is recognition of the content of the claim by other subjects of international law. Thus if the territory of Rhodesia is to have an independent status and if the present authorities are to have the capacity to commit

that/...

that territory in international law there must be recognition of state and recognition of government by other states.⁵⁰⁾

Even though, in itself, the Unilateral Declaration cannot bring about the desired result, it certainly has legal implications, it does affect the status quo in international law to some extent. It may afford a basis for the achievement of the desired results.

Once claims are made, other subjects of international law may afford recognition to them, thus validating them and giving them a basis in international law.⁵¹⁾ Again a subject of international law might specifically wish to preserve the legal status quo of government and territory as it existed before claims were made and with the object of rebutting any possible implication of

recognition/...

50) This statement is made on the basis of the Constitutive theory of recognition. The respective merits and demerits of the Constitutive and Declaratory theories of recognition are fully discussed infra, pp.170-284 and a preference for the former theory is expressed by the writer. If, however, the Declaratory theory is the correct one this still makes no difference to the point under discussion. The mere making of a claim to personality would not for example have the effect of making Rhodesia an international person. Something additional would be required and applying the Declaratory theory this would either be the objective existence of the indicia of independent statehood (see infra, pp.170-171) or recognition for even the adherents of the Declaratory theory concede that if a regime lacks the essentials of a state, to recognize it is to constitute it as a subject of international law. See Sorensen, p. 278. Sed contra A.J.G.M. Sandars, "Die Erkenning van State en Regerings" (33) T.H.R.-H.R., 1970, at p.260.

51) On the capacity to be recognized Le Normand, p. 55 says "quand une entité politique réunit et présente tous les caractères constitutifs d'un Etat, elle a l'aptitude nécessaire: mais cette aptitude n'engendre pas une obligation à la charge des autres." H.H.Marshall, note 9 supra, pp. 1024, 1033 sees difficulties in relation to the recognition of Rhodesia because of the attempt to establish a sovereign independent monarchy rather than a republic. These difficulties, it is submitted, did not exist, and in any event they would no longer be of relevance since the Proclamation of a Republic of Rhodesia.

recognition it might specifically declare its non-recognition.⁵²⁾

This is in effect the employment of the device of protest and reservation of rights.⁵³⁾

The Unilateral Declaration therefore affords an opportunity for the employment of these devices of international law, recognition and protest.⁵⁴⁾

The use of these devices has definite and decisive consequences in international law - they either alter or maintain the legal status quo ante.⁵⁵⁾ Because these consequences may follow upon/...

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- 52) Thus when in 1931 Japan invaded Manchuria the United States announced its intention not to recognize any situation brought about by means contrary to the obligations in the Treaty of Paris, 1928. For text of this doctrine called the Stimson Doctrine see (26) A.J.I.L., 1932, p. 342. See too Oppenheim, I, p. 138. Similarly when Great Britain became a party to the International Sugar Agreement 1958, it stated that it could not regard signature of the agreement by a Nationalist Chinese Representative as a valid signature on behalf of China since Britain did not recognize the Nationalist Government. The object was to rebut any possible implication of recognition of the latter government. See J.G. Starke, An Introduction to International Law, 5th Ed., p. 128.
- 53) See Schwarzenberger, Manual, p. 69. A protest constitutes a formal objection by which the protesting state makes it known that it does not recognize the legality or validity of the acts against which the protest is directed, that it does not acquiesce in the situation which such acts have created or which they threaten to create and that it has no intention of abandoning its own rights in the matter. In the latter connection it purports to be a reservation of rights. See I.C. MacGibbon, "Some Observations on the Part of Protest in International Law" (30) B.Y.I.L., 1953, p. 293, at pp. 294, 297, 298.
- 54) Both recognition and protest are in fact in themselves other species of unilateral declarations. Schwarzenberger, Manual, pp. 171-2. In a new situation states have a choice between protest and recognition. "La protestation peut, ... être basée simplement sur des considérations d'intérêts ... ou comporter, au contraire, l'allégation que l'acte contre lequel on proteste est illégal ..." A. Raestad, "La Reconnaissance internationale des nouveaux états et des nouveaux gouvernements" (17) Revue de Droit International et de Legislation comparée, 1936, p. 257 at p. 264.
- 55) Thus by virtue of the Unilateral Declaration and British action, Rhodesia ceased to be a self-governing colony. Other states could then recognize it as the independent state it claimed to be or on the other hand could recognize the full sovereignty and control of the United Kingdom over it. See J.E.S. Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965-1966, p. 103 at p. 110. The options which other states had and their exercise of these options is fully discussed infra, pp. 338-377.

upon a unilateral declaration of independence the declaration itself has, to this extent, legal significance in international law.⁵⁶⁾

(3) Legality of the Declaration.

From the point of view of constitutional law the Unilateral Declaration has been described as a revolution⁵⁷⁾ and it must therefore be deemed to be illegal in terms of the existing law at the time it was made.⁵⁸⁾ It amounted to the imposition of a new grundnorm⁵⁹⁾ which had/...

56) See in general the writer's article referred to in footnote 48 supra, at p.40.

57) Supra, pp. 126-129.

58) The overwhelming majority of opinions expressed in the political, judicial and academic spheres are to this effect. Thus the British Attorney General expressed the view that it was illegal. The Times, 13th November, 1965, p. 6 (f). The Governor Sir Humphrey Gibbs, in a message to the people of Rhodesia stated that he remained their legal governor whose duty it was to uphold the constitution and that he would not recognize the illegal government or the constitution they had presented to the country. The Times, 15th November, 1965, p.10(a). In the judicial sphere see Madzimbamuto v. Lardner-Burke N.N.Q., 1968 (2) S.A. 284 (R., A.D.) at 334; Madzimbamuto v. Lardner-Burke and Another, [1968], 3 W.L.R. 1229; R. v. Ndlovu, 1968 (4) S.A. 515 (R., A.D.) at 521 A-B. For academic opinions as to the illegality of the Declaration see Molteno, pp. 263, 274, 276, 288; G.N. Barrie who in "The Shifting Sands of Allegiance and Treason in Rhodesia" (1) C.I.L.S.A., 1968, p. 289 at p.293 describes it as a de facto government and in "Rhodesian U.D.I. - an unruly horse" (1) C.I.L.S.A., 1968 p. 110 at p.111 describes the Declaration as illegal; Christie, note 21 supra, p. 391; Kirkman, note 39 supra, p. 648 who says that the subsequent Proclamation of a Republic did not add to the illegality which was final with the Unilateral Declaration. This is surely correct; R.S. Welsh, "The Constitutional Case in Southern Rhodesia" (83) L.Q.R., 1967, p.64 at pp.64-65; Hahlo, note 36 supra, p.432; J.M. Eekelaar, "Rhodesia: the abdication of Constitutionalism" (32) M.L.R., 1969, p.19 at p.21; A.J.G. Lang, "Madzimbamuto's and Baron's Case at first Instance" (5) Rhodesia. L.J., 1965, p.65 at pp. 97, 98, 105; J.R. Dewhurst & R.G. Nairn, "The Objects of Law and the Rhodesian Constitutional Case" (1) Responsa Meridiana, 1968, no. 5, p. 165 at p. 173; C.W.H. Schmidt, "U.D.I. and the Law" (7) Codicillus, 1966, no. 1 p. 31; G.N. Barrie, "The High Court of Rhodesia and U.D.I." (30) T.H.R.-H.R., 1967, p. 147 at pp. 152-153; G.N. Barrie, "Die Geheime Raad en U.D.I." (32) T.H.R.-H.R., 1969, p. 171 at p. 172; John W. Halderman, "Some Legal Aspects of Sanctions in the Rhodesian Case" (17) I.C.L.Q., 1968, p.672 at p.699; Palley, pp. 802-810; Alan Wharam, "Rhodesia and the Crown" (9) Rhodesia. L.J., p. 21 at p. 37 although he sees the later actions of the British Government as removing Rhodesian allegiance (pp.36-38). Sed contra J.A. Coetzee, The Sovereignty of Rhodesia and the Law of Nations, Pretoria, 1970, who regards the process as one of

had no legal basis in the previously existing grundnorm.⁶⁰⁾ At first this new grundnorm was not accepted by the Rhodesian courts.⁶¹⁾ But later it was so accepted and the courts regarded the new Constitution and the Government established thereby as de iure constituted in Rhodesia.⁶²⁾ From the British point of view the new Grundnorm has however, no validity whatsoever.⁶³⁾ The position therefore appears to be as follows. In terms of municipal law (as it existed in Rhodesia) on the 11th November, 1965, the Unilateral Declaration of Independence was illegal. In terms of British Constitutional law it still continues to be illegal. As far, however, as Rhodesian municipal law is concerned, the revolution is complete, the/...

58) continued from previous page:

evolution rather than revolution. The main consequences of the illegality were that the Governor dismissed the Cabinet by Proclamation. The Times, 13th November, 1965, p. 10(b); the Rhodesian branch of the Commonwealth Parliamentary Association was expelled because the Rhodesian Parliament had condoned an act of rebellion and had actively supported the regime. The Times, 30th November, 1965, p. 10(b). The Queen refused to appoint a Governor-General on the advice of Mr. Smith. The Times, 4th December, 1965, p. 8(c). See too Palley, pp. 756 et seqq.

59) The Constitution of Rhodesia, 1965.

60) The 1961 Constitution. See supra, pp. 126-129.

61) Madzimbamuto and Another v. Lardner-Burke, N.O. and Another, 1966(4) S.A. 462 (R.); 1968 (2) S.A. 284 (R., A.D.). The court in effect avoided taking a stand on the issue in Central African Examiner (Pvt.) Ltd. v. Howman and Others, NN.O. 1966 (2) S.A. 1 (R.). A.M. Honoré, "Reflections on Revolutions" (2) Irish Jurist, (n.s.) 1967, p. 268 at 277 says that the Rhodesian court in the interim period "is here, it seems, propounding a legal theory to straddle a transitional period between two constitutions. It is, in fact, conducting a foray into the uncharted regions of inter or super-systematic laws, but is doing so as between successive and not, as is usual, between simultaneously operating systems".

62) R. v. Ndlovu and Others, 1968 (4) S.A. 207 (R); 1968 (4) S.A. 515 (R., A.D.). In Dhlamini and Others v. Carter, N.O. and Another, N.O. 1968 (2) S.A. 464 (R., A.D.) the court went some distance towards recognizing the new situation when it satisfied itself that an appeal to the Privy Counsel would be of no value because whatever the judgment might be it would be wholly ineffective in Rhodesia. See too, 1968 (2) S.A. 445 (R., A.D.), 1968 (2) S.A. 467 (R., A.D.) and R. v. Muzesa and Others, 1968 (4) S.A. 206 (R.).

63) Southern Rhodesia Act, 1965; Southern Rhodesia (Constitution) Order, 1965 (1965 S.L. 1952); Madzimbamuto v. Lardner Burke and Another, [1968], 3 W.L.R. 1229.

the grundnorm has shifted and the Unilateral Declaration and the new position has acquired a legal basis in that system but it had to wait for a period of almost three years to acquire that basis and it acquires it in Rhodesian municipal law alone.

The Unilateral Declaration was therefore unconstitutional at the time at which it was made and it must now be asked whether this has any legal significance in international law. In general, it may be said that from the point of view of international law the unconstitutionality of the Declaration does not matter greatly.⁶⁴⁾ Even if the United Kingdom had formally enacted legislation in terms of which Rhodesia was given independence, the newly independent state would, in principle, still require recognition by other states to be capable of enjoying international law rights against them.⁶⁵⁾ It is submitted, however, that the unconstitutionality of the Declaration has an international law significance in three respects:

- (a) If Rhodesia had received a constitutional grant of independence from the United Kingdom this in international law would amount at least to recognition of an independent Rhodesia by
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- the/...

64) See footnote 2 supra. C.A Crause, "Enkele Opmerkings oor Besluite van die Veiligheidsraad ten opsigte van Rhodesia" (29) T.H.R.-H.R., 1966, p.320 at p. 330. See too J.E.S. Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965-1966, p. 103 at p.113 who says that illegality of the rebellion is not the factor which renders U.D.I. without international effect.

65) The grant of recognition would appear to be entirely discretionary and this is the position whether the new entity evolves constitutionally or is born in revolution. See infra, pp. 285-295.

the United Kingdom itself.⁶⁶⁾ Rhodesia would thus be a full international person in its relations with the United Kingdom but would still await recognition by other states in order to attain an effective personality against them.

- (b) If Rhodesia had constitutionally received a grant of independence from Britain there could be no question of the doctrine of premature recognition being relevant in the Rhodesian case. Other states could fully recognize Rhodesia immediately because in doing so they would not interfere with any rights which the United Kingdom might have. There would, in other words, have been no question of a conflict between the international law position of Rhodesia as maintained by the United Kingdom and that maintained by Rhodesia itself. Both would be precisely in accord and immediate recognition could therefore be accorded. In such circumstances Rhodesian independence would not be opposable by the United Kingdom. The doctrine of premature recognition can only play a part where there are conflicting claims as to international status as in the present case. The rules relating to premature recognition are then applicable to third parties who have to make a choice between the competing claims.⁶⁷⁾

(c) /...

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- 66) A. Raestad, "La Reconnaissance internationale des nouveaux etats et des nouveaux gouvernement", (17) Revue de Droit International et de Legislation Comparee, 1936, p.257 at p. 273. O'Connell, I, p.130 says that when a State is granted independence by the mother country it acquires capacity by virtue of this act. Here recognition of independence is constitutive of the personality of the new state. As an instance he says that Burma existed in law from the moment that the Burma Independence Act, 1947, 11 & 12 Geo. 6, Ch. 3 became operative. The point is that the grant of independence amounts to recognition by the mother country. The same may be said of other instances where the United Kingdom has systematically granted independence to former dependencies. For the United States see Proclamation by the President, D.S.Bulletin, XV, NO.367, p. 66 in relation to the Philippines. See too the Netherlands-Indonesia, Charter of the Transfer of Sovereignty, U.N. DOC. S/1417/Add. 1. 14th Nov., 1949, p. 66.
- 67) The doctrine of premature recognition and its applicability to the Rhodesian situation is discussed infra, pp.295-301 in the context of the "duty not to recognize".

- (c) If Rhodesian independence had been constitutionally granted, it is probable that international recognition by other states would be granted far more readily than in the case of an unconstitutional claim such as the present.

We must now turn to the question of the legality or otherwise of the Declaration in international law. The question here simply is whether the Declaration infringes an established norm of international law. In international law there is certainly no such rule prohibiting constitutional revolutions.⁶⁸⁾ International law does not prevent revolution aimed at secession or the acquisition of independence.⁶⁹⁾ In other words, there is nothing in international law to prevent an entity which has no international personality from claiming such personality and there is nothing to prevent a government which has come to power in an unconstitutional manner from claiming to represent the state internationally. Whether or not such claims will ever be successful is another question which depends primarily on whether/...

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- 68) O'Connell, I, p. 137 says
"There can be no suggestion of making constitutional legitimacy a condition of recognition; such a rule would be tantamount to one of perpetual non-recognition of any revolutionary regime, and this is certainly not a rule of international law." See too D. Anzilotti, Cours de Droit International, Paris, 1929, Vol. I, p. 169 who says there is no such thing as the doctrine of legitimacy or a legal or illegal state and Rosalyn Higgins, "International Law, Rhodesia and the United Nations" (23) The World Today, 1967, pp.94-96 who says that neither international law nor the Charter prohibit rebellion.
- 69) Grotius, I ch. IV; C. Wolff, Ius Gentium, 1764, 613, 1010-1012; Vattel, III, ch. 18, 295; Lauterpacht, p. 8; G.I.A.D. Draper, "The Geneva Conventions 1949" (114) H.R., I, 1965, p. 59 at p.100; Akehurst, p.72; Rupert Emerson, "Self-Determination" (65) A.J.I.L., 1971, p. 459 at 474 and Rosalyn Higgins, The Development of International Law through the Political Organs of the United Nations, Oxford, 1963, p. 211 both are of the opinion that there is a right of revolution but they would appear to link it with the idea of self-determination. It is submitted that no such link is necessary. There has always been a right to revolt. M.C. Bassiouni, "Self-Determination and the Palestinians", Proceedings A.S.I.L., 1971, p. 31 at p. 33 points out that self-determination is invoked as a basis for revolution, cession, unification, minorities' rights.

whether other subjects of international law are disposed to grant recognition to such claims.⁷⁰⁾ But certainly such claims can be made.⁷¹⁾ In the past many such claims have been made as there are many examples of Unilateral Declarations of Independence in the history of international law.⁷²⁾ Thus the Dutch Republics separated from Spain in an Act of Abjuration of 1581.⁷³⁾ In 1641 Portugal declared itself independent of Spain.⁷⁴⁾ Declarations of Independence were made by North Carolina on 12th April 1776, Pennsylvania probably on 14th May, 1776, New Hampshire on 15th June, 1776, and Virginia probably in May, 1776.⁷⁵⁾ This was followed by the American Declaration of Independence on 4th July, 1776.⁷⁶⁾

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- 70) See in this connection the discussion of the Tobar Doctrine, the Wilson Policy and the Stimson Doctrine in O'Connell, I, pp. 137-140.
- 71) It is possible that a duty not to recognize unconstitutional regimes may be undertaken by treaty e.g. the 1907 Treaty in which five Central American Republics undertook not to recognize governments which came to power by unconstitutional means. See O'Connell, I, p. 137. Even this however, does not make such constitutional revolution illegal in international law. All it does is impose a duty not to recognize the claim arising from the revolution. Recognition of the revolution in such circumstances would of course be illegal in international law as it would be a breach of treaty but this would in no way render the revolution itself illegal. On the duty not to recognize see infra, pp. 295-333.
- 72) Crause, note 64 supra, p. 320.
- 73) Oppenheim, International Law, 8th Ed., London, 1955, Vol. I, p.579; A.P. Rubin, note 49 supra, p.812; Jochen A. Frowein, "Transfer or Recognition of Sovereignty - Some early Problems in Connection with Dependent Territories" (65) A.J.I.L., 1971, p. 568.
- 74) Ibid., p. 570.
- 75) Wharam, note 58 supra, at pp. 34-35. In Ware v. Hylton (1795) (U.S.S. Ct.) 3 Dallas 197 at 223 the court regarded independence as dating from the abolition of the old government in Virginia - probably May 1776. In addition several other North American colonies set up provisional governments or councils of safety at about the same time and in New Jersey the Governor was arrested on 3rd July, 1776. See Wharam, loc.cit.

1776.⁷⁶⁾ Between 1810 and 1826 various Latin American colonies of Spain declared their independence.⁷⁷⁾ In 1822 Brazil broke away from Portugal, in 1830 Belgium broke away from the Netherlands and Greece from Turkey.⁷⁸⁾ In 1878 Montenegro, Rumania and Serbia declared independence from Turkey,⁷⁹⁾ in 1898 Cuba from Spain, in 1903 Panama from Columbia.⁸⁰⁾ In 1912 Tibet possibly declared independence⁸¹⁾ and in 1913 Albania declared independence from Turkey.⁸²⁾ In 1916 the Irish Republic proclaimed independence from the United Kingdom.⁸³⁾ After the first World War many European states made such declarations, e.g. Finland, Latvia, Lithuania and Estonia from Russia, Poland from Germany and Austria.⁸⁴⁾ Manchuko in 1932, Slovakia in 1939 and Croatia in 1941 all made declarations of independence.⁸⁵⁾ In 1940, with the fall of France, Laos/...

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- 76) Ibid.; Rubin, note 49 supra, p. 812; Oppenheim, note 73 supra, p. 579. The Rhodesian U.D.I. has been said to be a paraphrase of the American Declaration but without the assertion that "all men are created equal." See Palley, p. 750; Chayes, II, p.1316. The characterization of this provision as an obvious difference is strange in view of the existence of the institution of slavery in America. There were however differences between the American and Rhodesian declarations. As D.B.Molteno, "The Flexibility of a 'Rigid' Constitution" (87) S.A.L.J., 1970, p. 204 at p.205 points out, the American secession was achieved by armed colonists and not by the agency of a subordinate colonial legislature. Marshall, note 9 supra, pp. 1023-1024 points out that the Americans declared a Republic while the Rhodesians retained the Queen as Head of State.
- 77) J.P.A. Francois, Handboek van het Volkerecht, Vol. I, Zwolle, 1949, p. 176. Oppenheim, I, pp. 124-125.
- 78) Oppenheim, note 73 supra, p. 579.
- 79) Francois, note 77 supra, p. 175.
- 80) Oppenheim, note 73 supra, p. 579.
- 81) Rubin, note 49 supra, at pp. 812-814 discusses in general whether Tibet can be said to have made a declaration of independence from China in 1912 or shortly thereafter and comes to a negative conclusion.
- 82) Francois, note 77, supra, p.175.
- 83) For text of the Proclamation see T.P. Coogan, Ireland Since the Rising, London, 1966, pp. 17-18. The outcome of the Proclamation was not however a Republic but an Irish Free State with Dominion status. Ibid., p.35.
- 84) Oppenheim, note 73 supra, p.579; Francois, note 77 supra, p.175.
- 85) Ibid., pp. 175-176.

Laos, Cambodia and Vietnam made proclamations of independence.⁸⁶⁾

In 1967 the Republic of Biafra proclaimed itself independent of Nigeria.⁸⁷⁾

In 1967 Anguilla declared itself to be independent of St. Kitts/Nevis/Anguilla.⁸⁸⁾

In 1971 Bangladesh declared independence from Pakistan.⁸⁹⁾

The Rhodesian Unilateral Declaration is therefore not illegal in international law. Nor can the situation which results therefrom be illegal.⁹⁰⁾

But neither is the situation legal in the sense that it acquires a basis in international law. The matter is simply extra-legal. In the same way as international law refuses to condemn it, that law also refuses to put the stamp of legality upon it until recognition is afforded. We are in effect here concerned with the concepts of invalidity and unlawfulness.⁹¹⁾ The situation/...

86) But French rule was reimposed after the war. See M. Broderick, "Associated Statehood - a new form of decolonization" (17) I.C.L.Q., 1968, p. 368 at p. 397.

87) For text of the Proclamation of the Republic of Biafra see (6) I.L.M. 1967, pp. 665-680.

88) J.A.C. Gutteridge, The United Nations in a Changing World, Manchester, 1969, p. 69.

89) For Proclamation of Independence see (11) I.L.M., 1972, pp. 119-121.

90) Halderman, note 58 supra, p. 700 states specifically that the Rhodesian secession was not illegal in international law.

91) See the interesting discussions revolving around these concepts in R.Y. Jennings, "Nullity and Effectiveness in International Law", Cambridge Essays in International Law, 1965, pp. 64-87 and E. Lauterpacht, "The Legal Effect of Illegal Acts of International Organizations", ibid., pp. 88-121. It is apparent that there is a clear distinction between the concepts. An act can be lawful but invalid in the sense that it is ineffective to achieve its designs. The converse is also true. An act can be valid but unlawful e.g. an act of premature recognition. See infra, pp. 328-333 Jennings, op. cit., p. 65 says that an act which produces no legal effects is not necessarily wrongful or illegal. Interhandel case, 1959 I.C.J. Rep., p. 6 at 118. At p. 66 Jennings says that acts which are performed by an entity with lack of capacity are null in the sense of being non-existent. Akehurst, p. 72 states the position concisely. There is no rule of international law which forbids secession nor is there any rule which forbids the mother-state from crushing the secession if it can and whatever the outcome of the struggle it will be accepted as legal in the eyes of international law.

situation resulting from the Unilateral Declaration is not unlawful. It conflicts with no established norm of international law. But it has no validity in the system either in that legally Rhodesia does not become an international person by virtue of the Unilateral Declaration.⁹²⁾ The situation can only be validated by recognition.

Yet we find that organs of the United Nations persist in referring to the Unilateral Declaration and the resulting situation as being "illegal".⁹³⁾ It is extremely doubtful whether this linguistic usage correctly reflects the international law position seeing that international law does not condemn rebellion.⁹⁴⁾ If by the term "illegal" the organs of the United Nations mean that the Unilateral Declaration and regime resulting therefrom are illegal as a matter of constitutional law, the use of the word is correct. The only international law significance of the usage is that it underlines a determination on the part of the majority of the

members/...

92) The distinction between unlawfulness and invalidity also applies in the sphere of municipal law. An obvious example would be the case where a person without testamentary capacity goes through the necessary procedure for making a will. His act is not illegal but it is invalid in the sense that it cannot achieve the desired effect.

93) See S. Res. 216 (1965); S. Res. 217 (1965); S. Res. 232 (1966); A. Res. 2151 (XXI); S. Res. 253 (1968); A. Res. 2383 (XXIII). In S. Res. 277 (1970) the proclamation of Republican status in Rhodesia is also labelled illegal. A. Res. 2765 (XXVI); A. Res. 2769 (XXVI).

94) Higgins, note 68 supra, pp. 94, 96 points out that neither international law nor the Charter of the United Nations prohibits rebellion. Halderman, note 58 supra, pp. 700, 701 refers to the fact that the General Assembly and the Security Council have described the Rhodesian secession as illegal. He regards this as an assertion of judicial powers by the two organs, powers which are not to be found in the Charter. He is of the view that the Rhodesian secession is not illegal in international law and points out that the General Assembly itself has on several occasions recommended that secession movements should succeed e.g. Indonesia, Algeria, Angola.

members of the United Nations not to accord any measure of recognition to the situation resulting from the Unilateral Declaration.⁹⁵⁾

The Unilateral Declaration has also been characterized as illegal on the grounds that it (i) constitutes an act of aggression,⁹⁶⁾ (ii) constitutes an infringement of the principle of self-determination, and, (iii) was an act of irresponsibility and a violation of the basic policies of the Charter of the United Nations.⁹⁷⁾ The present writer has criticized these views and a summary of the criticism will not be given.⁹⁸⁾

An act which is unlawful in international law can only be committed by an entity which enjoys personality in that system. There are only two possible entities which can bear responsibility for the Unilateral Declaration (a) the State Rhodesia and (b) the Individual members of the Rhodesian Government.⁹⁹⁾ The State of Rhodesia is not however a full international person in the absence of recognition and contemporary international law goes no further in the matter of individual responsibility than to concede that under international law/...

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- 95) The fact that Rhodesia proclaimed a Republic on 3rd March 1970 neither adds to nor subtracts in any way from the international law status of the territory. Precisely the same arguments apply to the Proclamation of a Republic as to the Unilateral Declaration itself. The Proclamation is not illegal in international law but neither does it have a valid basis in the system. Again, it is extra-legal. Kirkman, note 39 *supra*, p. 648 is correct when he says that the Proclamation of the Republic adds no further illegality.
- 96) McDougal & Reisman, "Rhodesia and the United Nations: The Lawfulness of International Concern" (62) *A.J.I.L.*, 1968, p. 10.
- 97) *Ibid.*, p. 12. The United States Representative to the Security Council of the United Nations considered that the Rhodesian secession violated the rights of the Rhodesian people under Chapter XI of the Charter. See Halderman, note 58 *supra*, p. 700.
- 98) "Rhodesia and the United Nations: The Lawfulness of International Concern - A Qualification" (2) *C.I.L.S.A.*, 1969, pp. 454-466.
- 99) And perhaps also the individual members of the Ruling Parliamentary party.

law the individual has a duty not to commit piracy, war crimes, crimes against peace and crimes against humanity, the last category even being doubtful. The Unilateral Declaration is therefore not attributable to an international person and cannot for this basic reason be illegal in international law.¹⁰⁰⁾

Apart from this basic argument it is clear that the Unilateral Declaration cannot constitute aggression either for it does not transcend the boundaries of internationally recognized states.¹⁰¹⁾

It took place within the frontiers of one internationally recognized state only viz. the United Kingdom and Colonies. Further, the concept of aggression is so fluid and imprecise that even were the act to have transcended international frontiers it might not be an act of such a nature as to constitute aggression. It is extremely doubtful if economic or ideological "aggression" is aggression in the legal sense and the act in question - the Unilateral Declaration - does not even go so far.¹⁰²⁾ In support of this contention reference may also be made to the United Nations Draft Proposals on Defining Aggression. Three such proposals were submitted.¹⁰³⁾ (i) By the Union of Soviet Socialist Republics,¹⁰⁴⁾ (ii) by Colombia, Cyprus, Ecuador, Ghana, Guyana, Haiti, Iran, Madagascar, Uganda and Yugoslavia,¹⁰⁵⁾ (iii) by Canada, Italy, Japan/...

100) Ibid., pp. 456-457.

101) Quincy Wright, "The Chinese Recognition Problem" (49) A.J.I.L., 1955, p. 320 at p. 333 says that if the Nationalist or Communist Chinese attacked each other, it would be civil strife. Neither could be accused of aggression "since that term in international law implies an international jurial frontier." See too the writer, note 98 supra, pp. 457-458.

102) Ibid., p. 458.

103) For the texts of the three draft proposal see (8) I.L.M., 1969, pp. 661-666.

104) U.N. Doc. A/AC. 134/L.12, 27th Feb., 1969.

105) U.N. Doc. A/AC. 134/L.16, 24th March, 1969.

Japan, the United Kingdom and the United States.¹⁰⁶⁾ It will be noted that all three proposals limit "aggression" to acts involving the use of force¹⁰⁷⁾ by a state against another state.¹⁰⁸⁾ Acts considered to be aggression are described in some detail. The provisions of the third draft are particularly interesting here in that it is provided that aggression cannot be committed by a political entity against a state to whose authority it is subject.¹⁰⁹⁾ Thus even if the Rhodesian government had utilized armed force to accomplish its revolution, it is extremely unlikely that this would have constituted aggression as Rhodesia was subject to the authority of the United Kingdom on 11th November, 1965. It must be conceded of course that these draft resolutions are in no way conclusive in relation to the definition of aggression but it is submitted that where they coincide substantially their evidential weight on the existence of the requisite elements of aggression is great because in such a context they represent a general consensus of opinion on the topic. They do so coincide in their emphasis on force utilized by one state against another as an essential element of aggression. It is also interesting to note that economic and ideological aggression are missing from the drafts as these appeared prominently in past drafts which aimed at defining aggression.¹¹⁰⁾ It is in any event practically impossible to define aggression satisfactorily.

John N. Hazard/...

106) U.N. Doc. A/AC. 134/L. 17, 25th March, 1969.

107) See (63) A.J.I.L., 1969, p. 569.

108) With the possible exception of attacks on armed forces, ships and aircraft of another state, all incidents of aggression seem to contemplate the crossing of frontiers. Ibid.

109) U.N. Doc. A/C Note 106 supra.

110) See the drafts submitted by the Soviet Union U.N. DOC. A/AC.66/L.2, 25th August, 1953; U.N. DOC. A/AC. 77/L.R., 23rd October, 1956; U.N. DOC. A/C. 6/L. 399, 3rd October, 1957; by Dahomey U.N. DOC. A/AC. 91/4, 15th March 1965; by the Democratic Republic of the Congo - U.N. DOC. A/AC. 91/4/Add. 1, 23rd March, 1965, p.2; by Burundi, ibid., p. 3.

John N. Hazard has highlighted some of the political difficulties involved. He says:

"The definition of aggression is one of the most politically orientated operations in a field where politics always plays some role", 111)

"It is general legal principles designed to fit dangerous situations that must be discussed and not carefully selected cases chosen to demonstrate the presence of a mote in an opponent's eye and no beam in one's own." 112)

On the technical difficulties, he says:

"There is no way to create situations which will confer upon states subjected to hostile action unquestioned authority to exercise their right of self-defence while waiting for the Security Council to act." 113)

On the legal difficulties involved, he says that the definitions

"...may be motivated by considerations of legal technique quite removed from power politics. The record of past attempts presents arguments based on the legal techniques of the principal legal systems of the world." 114)

He is here referring to the different attitudes to definitions held by common lawyers, civilians and the Marxian socialist legal systems.

Hazard in fact sees the principle role of the activities of the Special Committee on the Question of Defining Aggression established by the General Assembly of the United Nations as being educative.

"Clearly there are many views as to what should be included, what form the definition should take, and what consequences it should have. Conceived in educational terms the current return to attempts to define aggression can be meaningful in exploring these fundamental problems if the participants restrict themselves to discussion and education of each other."115)

We/...

111) "Why try to define aggression?" (62) A.J.I.L., 1968, p. 701 at p. 703.

112) Ibid., p.710.

113) Ibid., p.703.

114) Ibid.

115) Ibid.

We may also mention that the United States now stresses the futility of trying to define aggression when the invasion of Czechoslovakia violated every one of the Soviet Union's own proposed definitions of aggression.¹¹⁶⁾

Finally we may note that quite recently the normative character of the rule which prohibits reprisals involving the use of armed force - an undoubted example of "aggression" - has been called in question because of its divorce from the actual practice of states.¹¹⁷⁾

In the light of what we have said, the contention that the Rhodesian Unilateral Declaration of Independence amounted to aggression against the United Kingdom must be unequivocally rejected.

It is also clear that the Unilateral Declaration does not constitute an infringement of the principle of self-determination for this right is too controversial, unaccepted and even vague to be used by the Rhodesians as a shield or by anyone else as a sword against them.¹¹⁸⁾

Finally, even if we accept the fact that the Unilateral Declaration was an act of irresponsibility and that it militates against the policies of the majority of the members of the United Nations, this does not necessarily mean that it is also a violation of international law and thus illegal.¹¹⁹⁾

The overall conclusion therefore is that the Unilateral Declaration and the resulting situation are neither legal nor illegal in international law but are extra-legal. The same is the position in relation to the Proclamation of the Republic of Rhodesia.

SECTION II/...

116) (63) A.J.I.L., 1969, pp. 329, 570.

117) Derek Bowett, "Reprisals Involving Recourse to Armed Force" (66) A.J.I.L., 1972, p.1.

118) For amplification of this argument see infra, pp.472-520 and the writer at (2) C.I.L.S.A., 1969, pp. 458-460.

119) See the writer at (2) C.I.L.S.A., 1969, p. 465.

SECTION II

STATEHOOD OF RHODESIA.

As we have seen, Rhodesia by virtue of the Unilateral Declaration of Independence claims to be an independent state. The concept of statehood must therefore be examined to see whether this assertion is correct. For if Rhodesia is a state, and claims to be such, then it is capable of recognition as such. It must be understood, of course, that Rhodesia would merely enjoy the capacity to be recognized. Such recognition might never follow.¹⁾

The traditional international law requirements of independent statehood are all factual²⁾ and are the following:

- (1) The state must have a specific territory with more or less defined boundaries.³⁾ Clearly Rhodesia meets this requirement.
- (2) The state must have a population.⁴⁾ Again there is no doubt that Rhodesia fulfills this requirement.
- (3) The state must have a government which must have two characteristics viz independence and effectiveness.⁵⁾ These requirements merit separate discussion.

(a)/...

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- 1) See the writer's "Status of Rhodesia in International Law", Acta Juridica, 1967, p.40.
 - 2) Brierly, p. 137.
 - 3) Schwarzenberger, Manual p. 55; Starke, p. 101; Montevideo Convention on the Rights and Duties of States, 1933; Whiteman, II, p.17; Oppenheim, I, p.114; Briggs, pp. 70-71; Chayes, II, p.1336; Chen, pp. 55-57; David A. Ijalaye, "Was Biafra at any time a state in International Law?" (65) A.J.I.L., 1971, p.551; B.R. Bot, Non-recognition and Treaty Relations, Leiden, 1968, p.21; C.A. Crause, "Enkele Opmerkingen oor Besluite van die Veiligheidsraad ten opsigte van Rhodesië " (29) T.H.R.-H.R., 1966, p. 320 at p. 330; Lauterpacht, p.30; Deutsche Continental Gas-Gesellschaft v. Polish State, Ann Dig. 1929-1930, Case No. 5 (c) pp. 14-15.
 - 4) See authorities quoted in footnote 3) supra.
 - 5) Ibid.

(a) The requirement of independence.⁶⁾

This requirement embodies the following essential features:

- (i) There must be factual freedom from the control of other states including naturally freedom from the application of the law of other states.⁷⁾ Thus if any organ of state is subjected to a degree of control by the governmental organs of any other state and if this position is acknowledged by the constitutional law of the former state, the requirement of independence is not present. If, therefore, the Constitution of a British territory admits the application of the Colonial Laws Validity Act, 1865⁸⁾ and a power of disallowance in the Crown acting on the advice of its United Kingdom ministers, that territory cannot be independent. The 1961 Constitution of Southern Rhodesia made such provisions⁹⁾ and therefore Southern Rhodesia could not be said to be independent. On the other hand, the Constitution of Rhodesia 1965 does not admit of any such controls by the organs of an outside state¹⁰⁾ and so it is submitted that Rhodesia fulfills this requisite of freedom from external laws.¹¹⁾

(ii)/...

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- 6) Oppenheim, I, pp. 114-115 describes the requirement of independence by saying that the government must be sovereign.
- 7) H. Kelsen, "Recognition in International Law - Theoretical Observations" (35) A.J.I.L., 1941, pp. 605 at 607-608. A state which deprives itself of its organic powers ceases to be independent. See Austro-German Customs Union case, P.C.I.J. ser. A/B no. 41 (1931) at pp. 45, 57-58, 77.
- 8) 28 & 29 Vict., C.63.
- 9) Supra, p. 12.
- 10) Supra, pp. 123-124.
- 11) Subjection to international law rules operative in favour of another state does not of course detract from the characteristic of independence. See Kelsen, note 7) supra, pp. 607-608; Austro-German Customs Union case, note 7) supra, loc.cit.

- (ii) The government must not in fact be dependent on another state to maintain order and effectiveness.

Thus a Committee of Jurists entrusted by the Council of the League of Nations to give an advisory opinion on the Aaland Islands controversy decided that Finland was not a state at the relevant time, one of the grounds being that its authorities were not strong enough to assert themselves throughout the territory without the assistance of foreign troops.¹²⁾ So too Manchuria, between 1932 and 1945, was in fact dominated by Japan and also Slovakia and Croatia during the Second World War.¹³⁾ It has been suggested that Rhodesia is not independent because it is dependent on South Africa for economic, military and moral support.¹⁴⁾ With respect, however, it is submitted that economic or military dependence on another state (or group of states) does not affect legal independence.¹⁵⁾ Such phenomena are extremely common in present-day international relations. It is true that South African forces have been present in Rhodesia since 1967 but it is submitted that not even this affects the independence of Rhodesia because these forces are present to combat armed infiltration into Rhodesia from beyond its borders. It is only at the stage when such armed forces are necessary to bolster the government/...

12) Lauterpacht, pp. 50-51.

13) Lauterpacht, pp. 27-28.

14) M.A. Mahmoud, The Juridical Manifesto, The Hague, 1969, p.104.

15) The legal conception of independence has nothing to do with the numerous and constantly increasing states of de facto dependence which characterise the relation of one country to other countries. Austro-German Customs Union case, note 7) supra.

government of Rhodesia in maintaining internal order that they could be said to affect Rhodesian independence. That stage would not appear to have been reached.¹⁶⁾

In the case of a breakaway state such as Rhodesia, the entity must naturally be independent of both the mother state and third states.¹⁷⁾ This means that in such a case the following additional features must be present:

- (A) The Constitutional claims of the mother country after secession must not be acknowledged by the breakaway entity.¹⁸⁾ In the case of Rhodesia it is clear that the constitutional claims of the United Kingdom made after the Unilateral Declaration of Independence have not been acknowledged in Rhodesia.¹⁹⁾
- (B) The mother state must have lost factual control of the situation. Its authority must have been displaced and it must have lost its effectiveness. This will

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- 16) In Madzimbamuto v. Lardner-Burke N.O. & Another, 1968 (2) S A.284 (R.,A.D.) the court found at 325 that there were no signs of revolt at all against the Government which was in effective control. See too R. v. Ndhlovu and Others, 1968 (4) S.A. 515 (R, A.D.) 531-532, 536. See the writer's "Does South Africa Recognize Rhodesian Independence?" (86) S A L.J., 1969, p.438.
- 17) Lauterpacht, pp. 26, 27; Chen, p.58; Crause, note 3) supra, p.330.
- 18) In Yrisarri v. Clement (1825) 2 Car. & P. 223 Best, C.J. held at 225 that "... it makes no difference whether they [the Latin American Republics] formerly belonged to Spain, if they do not continue to acknowledge it"
- 19) "None of the legislative acts of the United Kingdom has been recognized or enforced in the country since the Declaration of Independence." Per Beadle, C.J. in Madzimbamuto's case, note 16) supra, 307.

be the position when the entity claiming independence is in possession of a force sufficient to support itself in opposition to the mother state.²⁰⁾

It would appear from the following that the authority of the United Kingdom has been successfully displaced in Rhodesia. Molteno.²¹⁾ points out that United Kingdom legislation passed after U.D.I. remained on paper only; Rhodesia was administered in direct opposition to the Queen, advised by United Kingdom Ministers; the Governor appointed by the Queen was entirely ignored and finally not only did the Rhodesian Government ignore United Kingdom legislation imposing economic sanctions but they successfully defied it. Christie²²⁾ points out that the lack of effective practical power in the United Kingdom was dramatically demonstrated by the incident involving the purported exercise of the Royal Prerogative of mercy²³⁾ and by the rejection by the court of a certificate of the Secretary of State for Commonwealth Relations that the Government of Rhodesia was not recognized by the Crown and was therefore illegal.²⁴⁾

Molteno says that it is difficult to conceive what more effective/...

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- 20) Lauterpacht, p. 26; Yrisarri case, note 18) supra, at 225. H. Kelsen. General Theory of Law and the State, New York, 1961, p.219 says that the moment at which a national legal order ceases to be valid is determined by positive international law according to the principle of effectiveness. This delimits the temporal sphere of validity of a national legal order.
- 21) P.427.
- 22) R.H.Christie, "Practical Jurisprudence in Rhodesia" (1) C.I.L.S.A. 1968, pp. 390-407, (2) C.I.L.S.A., 1969, pp. 3-23, 206-221 at pp. 218, 219.
- 23) Dhlamini v. Carter N.O. & Another, N.O., 1968 (2) S.A. 467 (R.,A.D.)
- 24) See Madzimbamuto's case, note 16) supra, 285-289.

effective steps the Rhodesian Government could have taken to demonstrate more convincingly its usurpation of the sovereignty of the United Kingdom²⁵⁾ and Crause concludes

"Dit wil voorkom asof die Rhodesiese regering geheel en al onafhanklik van Brittanje, as ook van enige ander staat, optree. Brittanje skyn geheel en al vervang te wees, terwyl die Rhodesiese regering sy funksies effektief op sy eie uitoefen." 26)

The factual findings of tribunals sitting in Rhodesia and presumably conversant with the circumstances prevailing there must, it is submitted, carry great evidential value on the factual question whether the authority of the United Kingdom is ineffective in Rhodesia. In this regard Beadle, C.J., held in Madzimbamuto's case that:

"None of the legislative acts of the United Kingdom has been recognized or enforced in the country since the Declaration of Independence" and "... that few well-informed persons living in Rhodesia at the moment would disagree with the statement that the territory has been 'effectively governed during the past two years' the question to be asked is: 'By whom?' Certainly not the Government of the United Kingdom ..." 27)

The same judge held in Dhlamini's case that

"The legislation passed by the United Kingdom Government... has at all relevant times been totally ineffective and certainly has no validity in Rhodesia today." 28)

Finally/...

25) P. 427.

26) Note 3) supra, p. 330.

27) Note 16) supra, at 306-307 and 321.

28) Note 23) supra, at 468. Christie, note 22) supra, pp. 210-212 points out clearly the reasons for the ineffectiveness of the United Kingdom legislation. It had the disadvantage that it was not exercised by agreement (as it always had been before) so had no support from the habit of obedience that ties people to familiar sources; it was not promulgated extensively in Rhodesia; it had the disadvantages inherent in its own incompleteness and by ignoring its own effectiveness in Rhodesia, it reduced its prospects of becoming effective in the future. At p.218 he draws a distinction between actual and potential power. The potential power of Britain is much greater than that of Rhodesia but for reasons of self-restraint it lacks effective practical power.

Finally in relation to the requirement of independence we must discuss briefly the relevance of the attitude of the mother-state to the breakaway entity. Here a positive attitude on the part of the mother state (i.e. an attitude that the breakaway entity is independent) raises a strong but not conclusive presumption of independence.²⁹⁾ This is of course irrelevant in the Rhodesian context at present as no such attitude has been displayed by the United Kingdom Government. On the other hand a negative attitude on the part of the mother state is irrelevant, i.e. the mere assertion of right by the mother state does not affect the independence of a breakaway entity.³⁰⁾ Applied in the context of Rhodesia this means that continued assertion of United Kingdom authority over Rhodesia cannot prevent Rhodesia from being an independent state.³¹⁾

It is submitted from all we have said above, that the Rhodesian Government exhibits the characteristic of independence.

(b)/...

29) Lauterpacht, p. 26.

30) Lauterpacht, p. 26; Crause, note 3) supra, p. 330; Oppenheim, I, pp. 124-125; the writer, note 1) supra, p. 46.

31) J.E.S. Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965-1966, p. 103 at p.111. In Madzimbamuto v. Lardner-Burke N.O. and Another, 1968 (3) All E.R. 561 (P.C.) at 574-575 the Privy Council seemed to hold that as long as the lawful government was striving to assert its lawful right, the usurping government could not become legitimate. Molteno interprets this to mean that as long as the status of the usurper is challenged by the legitimate government, the achievement of legitimacy will, in practice, be hampered. He points out various objections which can be raised against the Board's reasoning here (pp. 431-432). In any event the Board was concerned with the relevance of continued assertion of right by the mother state in relation to the question of the attainment of constitutional law legitimacy and not in relation to the question of the attainment of international law independence, with which we are here concerned.

(b) The requirement of effectiveness.

With the requirement of independence we were in essence concerned with the ineffectiveness of other states in relation to the government of the state in question. With this requirement we are concerned with the domestic effectiveness or efficacy of the government in question and of course such efficacy does not necessarily follow from the fact that other states are ineffective. It is clear that traditional international law required efficacy on the part of the government.³²⁾ This means that there has to be factual control of the organs of government³³⁾ and a sufficient degree of internal stability.³⁴⁾ The traditional test for such internal effectiveness or stability was whether the population of the territory rendered habitual obedience to the government.³⁵⁾ If the government is able to exercise its functions without substantial resistance this requirement is present. Absence of resistance need not rest on free consent. De facto submission is enough whether happily, indifferently, grumblingly, voluntarily or out of fear.³⁶⁾

The/...

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- 32) Yrisarri v. Clement, note 18) supra at 225; Madzimbamuto's case, note 31) supra, at 573-574; Crause, note 3) supra, p. 330; Molteno, pp. 410, 421-422; Lauterpacht, p. 28; J.L. Kuntz, "Critical Remarks on Lauterpacht's 'Recognition in International Law'" (44) A.J.I.L., 1950. p. 713 at p. 715; B.R. Bot, Non-recognition and Treaty Relations, Leiden, 1968. Kelsen, note 20) supra, pp. 121, 219 says that the moment when a national legal order, and thus the state, begins to be valid is determined by positive international law according to the principle of effectiveness.
- 33) H.R. Hahlo, "The Privy Council and the 'Gentle Revolution'" (86) S.A.L.J., 1969, p.419 at p.432 quoting Berber, Public International Law, I, (1960) p.235.
- 34) Lauterpacht, p.28.
- 35) Starke, p.101; Whiteman, II, p.17; A.Res. 195 (111) para. 2; Hahlo, note 33) supra, p.432; Lauterpacht, p. 28; Chen, pp. 57-58; Kelsen, note 20) supra, pp. 39-40, 219.
- 36) Hahlo, note 33) supra, p. 432.

The question whether the Government of Rhodesia is effective has been examined by the Rhodesian courts and their findings, as tribunals situated in Rhodesia and presumably acquainted with surrounding circumstances, must, it is submitted, be very persuasive here.

In Madzimbamuto's case, Beadle, C.J., held that the Government of Rhodesia was in effective control over the territory.³⁷⁾ The former constitution was held to be completely defunct.³⁸⁾ But though Beadle, C.J. held that the Government of Rhodesia was an effective government, he would not go so far as to hold that it was an established government.³⁹⁾ It is clear, however, that a government can be effective in the sense of extracting habitual obedience without being as yet firmly established⁴⁰⁾ and if so it possesses the requirement of effectiveness for international law purposes.

Quenet, J.P./...

37) Note 16) at 306-307, 321, 326.

38) Ibid., 321, 331.

39) Ibid., 326. He therefore held that the Government of Rhodesia was a de facto government thereby drawing a distinction between de iure and de facto governments which he would appear to equate with established governments and effective governments respectively. He then outlined the limits of the powers of a de facto government, saying that they must govern in terms of the suspended constitution. Ibid., 352. With respect, it is submitted that the view of MacDonald, J.A. (ibid 415-416) that in municipal law there is no distinction between a government de facto and one de iure is preferable. The distinction is one which pertains to international law recognition.

40) According to Beadle, C.J. the distinction between a de facto (i.e. effective) government and a de iure (i.e. established) one lies in the fact that the former is merely likely to continue while the latter is firmly established. Ibid., 326. Again, with respect, it is submitted that these notions pertain primarily to the question of international law recognition. In municipal law these are merely evidential factors which have a bearing on the effectiveness or otherwise of the regime. See Molteno, pp. 421-422.

Quenet, J.P. held in the same case that internal stability was being maintained by the Government which was in control.⁴¹⁾

Fieldsend, A J.A., held however that if the Government was to be a de facto government it should exercise all the powers of government, executive, legislative and judicial⁴²⁾ and that in the case of Rhodesia the present authorities had not usurped the judicial authority and hence usurpation was not complete.⁴³⁾

It is submitted, however, that the fact that the Rhodesian judges, or at least some of them, may have purported to act under the 1961 Constitution even after the Unilateral Declaration of Independence, did not affect the effectiveness of the Rhodesian Government. For, as Beadle, C.J. pointed out, the court derived authority from the fact that the present government allowed it to function and allowed officials to enforce its orders.⁴⁴⁾ In addition, it is clear that if the judiciary came into such direct confrontation with the government as the latter were not prepared to tolerate, the judiciary or individual members of it could have been effectively removed from office.⁴⁵⁾

Regardless/...

41) Madzimbamuto's case, note 16) supra, 369E, 370A. Similar conclusions were reached by MacDonald, J.A. at 416-417 and Jarvis, A.J.A. at 422.

42) Ibid., 427.

43) Ibid., 428.

44) Ibid., 331. Section 128(2) of the 1965 Constitution provided that the existing judiciary should continue in office and be deemed to have been appointed under the 1965 Constitution. Beadle, C.J. of course regarded the regime as being a de facto government. Molteno, pp. 416-417 points out that the logical outcome of the court's deriving its authority from such a regime must be that the court itself is a de facto court.

45) Section 128 (4) (b) of the 1965 Constitution provided that a judge might be required to accept the 1965 Constitution and take the oath of loyalty and judicial oath set out in that Constitution and if he refused to do so, his office should be deemed vacant.

Regardless, however, of what the position may have been before 15th August, 1968, it is submitted that since that date there can be no doubt whatsoever as to the efficacy of the Government of Rhodesia. In R. v. Ndhlovu and Others,⁴⁶⁾ decided on that date, Beadle, C J. held that the factual situation had changed since Madzimbamuto's case and that the government which was then merely 'likely to continue' now was firmly established.⁴⁷⁾

The overall submission then is that Rhodesia today meets the traditional requirement of effective government and that in all probability even before 15th August, 1968, it met the requirement.⁴⁸⁾

In a recent work, an additional requirement for effectiveness was postulated.⁴⁹⁾ This new proposal requires that the government of a state should not only be effective (in the traditional sense of exacting habitual obedience) but should also be effective:

"for the purpose of making and executing those decisions that good government entails".

The requirement will not be present:

"if/...

46) 1968 (4) S.A. 515 (R., A.D.)

47) Ibid., 528-532, 536. See too the judgment of Quenet, J.P. at 539-543.

48) Molteno, p. 427 referring to the finding of Beadle, C.J. in Madzimbamuto's case that though the Rhodesian government was effective, it was not firmly established, says that it is difficult to conceive what more effective and decisive steps the Rhodesian Government could have taken to demonstrate its usurpation more convincingly. Crause, note 3) supra, p.330, writing in the pre-1968 era, considers that "... die Rhodesiese regering sy funksies effektief op sy eie uitoeven".

49) J.E.S. Fawcett, The Law of Nations, London, 1968.

"if there is a systematic denial to a substantial minority and still more to a majority of the people, of a place and a say in the government as well...." 50)

If this novel requirement has established itself as an international law requirement for the existence of statehood, it can of course be argued that Rhodesia is not a state.⁵¹⁾ The present writer has previously labelled the requirement as the requirement of "good government"⁵²⁾ and he has examined the requirement to see whether it has established itself as a matter of international law.⁵³⁾ He concluded that it had not so established itself⁵⁴⁾ for the following reasons

(i) There is no previous authority for such a requirement.⁵⁵⁾

(ii) The proponent of the requirement claims that it has established itself because:

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- 50) Ibid., pp. 38-39; J.E.S. Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L. 1965-1966, p.103 at pp. 112-113. Earlier the same writer put the same proposition in terms of recognition. See J.E.S. Fawcett, "Some Recent Applications of International Law by the United States" (35) B.Y.I.L., 1959, p. 244 at 249-250 where it is stated that a government which deliberately flouts international standards of conduct is not entitled to recognition. See too J.E.S.F. at (34) M.L.R., 1971, at p.417 and note 49) supra, p.39. This new requirement in relation to recognition is discussed infra, p.32.
- 51) This is precisely what J.E.S. Fawcett argues in relation to Rhodesia. Note 49) supra, p. 39; (41) B.Y.I.L., 1965-1966, pp. 112-113; (34) M.L.R., 1971, p. 417.
- 52) J.E.S. Fawcett (34) M.L.R., 1971, p. 417 criticises the use by the present writer of the phrase "good government" to describe the new requirement. According to him, the new requirement is to be equated with the right of all people to have effective representation, direct or indirect, in their government, which has nothing to do with whether the government is good or efficient. The present writer accepts Mr. Fawcett's new requirement as explained by him here. Indeed the phrase "good government" is only adopted as a convenient term for indicating the requirement.
- 53) "The Requirements of Statehood Re-examined" (34) M.L.R., 1971, pp. 410-417.
- 54) The writer's conclusions were in turn criticized by J.E.S. Fawcett (34) M.L.R., 1971, p. 417. Such criticism will be referred to in the course of the following discussion at the relevant places.
- 55) The writer, note 53) supra, pp. 411-412. J.E.S. Fawcett (34) M.L.R. 1971, p. 417 regards it as a "new and additional criterion of statehood". B.R.Bot, note 3) supra, pp. 21-22 says that states considering recognition have often insisted on free elections, the hallmark of democratic legality and other criteria but none seem to constitute an essential element in the evaluation of a new government's international effectiveness.

"The massive condemnation of the Unilateral Declaration of Independence in Rhodesia suggests that a new state cannot now claim recognition if it fails to meet this criterion." 56)

But the resolutions in question⁵⁷⁾ do not say that Rhodesia is not a state. They seem to be more concerned with the question of other states recognizing the State of Rhodesia.⁵⁸⁾

(iii) In any event even if the resolutions can be interpreted to mean that Rhodesia is not a state, this would in no way be conclusive as to the absence of statehood in Rhodesia because the Assembly is not possessed of a judicial capacity to determine the existence or absence of such facts in a legally binding manner. The subjective views of the majority of the General Assembly cannot affect the objective existence of the characteristics of independence in a state. These are facts.⁵⁹⁾

(iv) The new requirement to be accepted would need to have established itself through the operation of the custom-forming process. But no general practice has as yet

evolved/...

56) Fawcett, note 49) supra, p. 39.

57) A. Res. 2379 (XX III); A. Res. 2024 (XX); A. Res. 2151 (XXI); A. Res. 2383 (XXIII).

58) The writer, note 53) supra, pp. 412-413. It is arguable that the United Nations even regards Rhodesia as being a state. Ibid., p.412. See too Beadle, C.J. in Madzimbamuto's case note 16) supra at 309-310 who says: "These resolutions certainly cannot be construed as any form of international recognition but it is implicit in them that the organization must have regarded Rhodesia as possessing the characteristics of a state because the actions which these resolutions have set in train are actions which, in terms of the United Nations Charter, can only be taken against another state." For the view that the United Nations does not consider Rhodesia to be a state see Michael Akehurst, "State Responsibility for the Wrongful Acts of Rebels - an Aspect of the Southern Rhodesian Problem" (43) B.Y.I.L., 1968-1969, p. 49 at p.55.

59) The writer, note 53) supra, p. 413.

evolved in this particular connection and even if such a practice had developed it is extremely doubtful if it would meet the test of continuity seeing that it would seem to have developed with reference to the isolated instance of Rhodesia.⁶⁰⁾ J.E.S. Fawcett replies to this argument by stating that the general practice that is in issue here is not that of other cases of new states being treated in the same way as Rhodesia - but the emerging acceptance of self-determination as a basic principle of law and government.⁶¹⁾

With respect, the present writer would like to make two observations on this argument. In the first place it is controversial whether the principle of self-determination has as yet evolved into a rule of customary international law.⁶²⁾ In the second place, even if the principle of self-determination has established itself unequivocally as a matter of international customary law, this would still not prevent Rhodesia from being a state (assuming of course that it infringed the principle of self-determination). Mr. Fawcett's argument here, it is submitted with respect, is an argument by analogy. It is an argument which determines status (or rather the lack of it) from non-observance of obligations. From Rhodesia's failure to observe the obligation to concede self-determination, it is deduced that Rhodesia has no status. It is submitted, however,

60) Ibid., pp. 413-415.

61) (34) M.L.R., 1971, p.417.

62) This question is discussed in detail infra, pp.472-520.

however, that precedents from the field of international obligations may not be correctly applied in the field of status. A precedent that an existing subject is obliged to act in a certain way - here to concede self-determination - is not of relevance to the question whether a new subject has status as a subject because it does not observe the obligation. It is, of course, a precedent that the new subject is obliged to act in a certain way but it is submitted that it is irrelevant in so far as its status qua subject is concerned.⁶³⁾

In the same paper the present writer also drew attention to the practical difficulties such a requirement would create, the possible reason for the postulation of the requirement and the necessity for the existence of the requirement.

If the requirement was accepted it would mean that those states which did not meet the requirement would no longer be states and this could conceivably apply to the majority of states in the international community. Withdrawal of recognition with resultant international outlawry would then be a possibility.

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- 63) On argument by analogy see the North Sea Continental Shelf cases I.C.J. Rep. 1969, at paragraph 79 where the World Court considered that median-line delimitations between opposite states were sufficiently distinct not to constitute precedents for the delimitation of lateral boundaries. See too paragraph 80 where the Court held that not even the division of adjacent territorial waters to be analogous to that of the Continental Shelf.
- 64) The writer, note 53) supra, pp. 410-411. Withdrawal of recognition is not an arbitrary act of policy but is an application of international law, namely, a declaration that the objective requirements for recognition have ceased to exist. See Chen, note 3) supra, p.260. It is a declaration that a community ceases to fulfil the conditions which general international law attaches to the existence of a state. The consequence of withdrawal is that international law no longer governs relations between the withdrawer and the entity from which recognition is withdrawn. H. Kelsen, "Recognition in International Law - Theoretical Observations" (35) A.J.I.L., 1941, p. 605 at p.611.

A possible reason for the requirement was found to lie in the Declaratory theory of recognition according to which a state with the characteristics of statehood is automatically an international person. This theory is in fact more popular in contemporary international law thought than its rival, the Constitutive theory, which would make personality dependent upon recognition.⁶⁵⁾

Applying the Declaratory theory, the inescapable conclusion is that Rhodesia is an international person but as this conclusion would be anathema to the majority of states, a new requirement of statehood is postulated which Rhodesia would experience difficulty in meeting. It can then be argued that Rhodesia is not a state and the Declaratory theory is rescued from the production of an unpalatable result.⁶⁶⁾

It was also submitted that the requirement was unnecessary and superfluous if one was prepared to apply the Constitutive theory of recognition consistently. Other states can then simply deny Rhodesia a personality (even though it is in fact a state) simply by refusing to recognize it. And if this were insufficient the Security Council of the United Nations could even impose a duty not to recognize on member states of the United Nations. The views of the community of states in relation to the creation of a personality in Rhodesia could find expression in this way.⁶⁷⁾

For/...

65) The merits of these conflicting theories are fully discussed infra, pp. 170-284.

66) The writer, note 53) supra, pp. 415-416.

67) Ibid., pp. 416-417.

For the above reasons it is submitted that the requirement of "good government" has not established itself as a matter of international law, that such a requirement would be an unwelcome addition to international law jurisprudence and, in the last resort, unnecessary.

- (4) A fourth requirement of independent statehood is sometimes postulated, that the state must have the capacity to partake in international intercourse.⁶⁸⁾ With respect, it is submitted that this fourth requirement is superfluous for if a state has an effective and independent government it will inevitably have the factual ability to participate in international intercourse.⁶⁹⁾ In any event, even if there is such a requirement, Rhodesia, it is submitted, meets it. This has been amply demonstrated by the fact that Rhodesia was in a position to conduct informal negotiations with the United Kingdom concerning the future of the country with a view to a possible settlement⁷⁰⁾ and undoubtedly would be able to do so in the future; was
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- able/...

- 68) Starke, p. 102 considers this the most important characteristic. See too, Briggs, p. 70; Restatement of Foreign Relations Law of the United States, §100; Chayes, II, pp. 1335-1336.
- 69) The writer, note 53) supra, p. 410; David A. Ijalaye, "Was Biafra at any Time a State in International Law", (65) A.J.I.L., 1971, p.551 at p. 552 appears to regard the requirement as superfluous in that the existence of the factual elements and recognition between them provide sufficient criteria for the personality of a state. He comments as follows on Starke's requirement - the capacity to maintain external relations: "It would appear that there is no way of acquiring this 'recognised capacity' than by the grant of formal recognition by existing states. The question of capacity to enter into relations with other states thus shades into the question of the nascent state's being formally recognized by other states". See too Akehurst, p.72 who couples the requirement with that of effective government.
- 70) The so-called Fearless and Tiger proposals. These are discussed in Baron, "The Rhodesian Saga", (1) Zambia Law Journal, 1969, pp.36-64 and infra, pp.

able to conclude an agreement with the United Kingdom;⁷¹⁾ by the fact that Rhodesia has an accredited representative in South Africa⁷²⁾ and that for four and a half years after the declaration of independence consular relations were in effect maintained by several countries with Rhodesia.⁷³⁾

- (5) The requirement of legitimacy has sometimes been asserted as an essential characteristic of statehood. This requirement asserts that the new entity or the new regime must be constitutional i.e. it must be legal in terms of municipal law. In the Rhodesian context this would mean that independence could only be transferred to Rhodesia by the United Kingdom Parliament and failing such transfer Rhodesia could not be an independent state.

It is true that there is some evidence of the existence of a doctrine of legitimacy in the state practice of the 16th and 17th centuries.

The Netherlands declared its independence from Spain in 1581.

England and France refused to recognize it and refused to receive its ambassadors on an equal footing with those of other states.⁷⁴⁾

In/...

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- 71) See Anglo-Rhodesian Relations - Proposals for a Settlement, Cmd.R.R. 46 of 1971. The proposals failed the test of acceptability when the Pearse Commission reported that they were not acceptable to the people of Rhodesia as a whole.
- 72) See the writer, "Status of Rhodesia in International Law", Acta Juridica, 1967, p.41.
- 73) At the time of the Unilateral Declaration of Independence the following states maintained consular relations with Rhodesia: Australia, Austria, Belgium, Canada, Finland, France, Greece, Italy, Japan, Netherlands, Portugal, South Africa, Sweden, Switzerland, Turkey, United States of America, West Germany. Six of these closed their consulates after the Unilateral Declaration; Australia, Canada, Finland, Japan, Sweden, Turkey. See Die Burger, 11th March, 1970. All the remaining lands with the exception of South Africa closed their consulates in the months following the Proclamation of the Rhodesian Republic. See Die Burger, 11th March, 1970; 27th April, 1970; Cape Times, 20th March, 1970.
- 74) Jochen A. Frowein, "Transfer or Recognition of Sovereignty - Some Early Problems in Connection with Dependent Territories" (65) A.J.I.L., 1971, p. 568. However this practice is equivocal because France and England did receive ambassadors and did conclude treaties of alliance with the Netherlands. Ibid.

In addition the Holy Roman Emperor refused in 1646 to give its ambassadors the title of "Excellency" as long as Spain did not grant them this title.⁷⁵⁾ Portugal declared independence from Spain in 1641. She was not allowed to send representatives to the Westphalia Peace Conference of 1648 because she was not treated as a fully sovereign state and later in the 17th century there were still doubts about Portuguese sovereignty because Spain had not formally renounced her rights.⁷⁶⁾ The Swiss Confederacy was recognized by the Treaty of Westphalia. There was doubt as to whether such sovereignty had actually been transferred from the Holy Roman Empire.⁷⁷⁾ There is thus some evidence of the existence of a doctrine of legitimacy in early state practice but, as pointed out, the evidence is equivocal and when we examine the classical writers we find that they are opposed to it⁷⁸⁾ and Moser does not consider that sovereignty was transferred by the Holy Roman Empire to the Swiss Confederacy but that the latter had attained independence by itself.⁷⁹⁾ The doctrine of legitimacy was next resurrected by the/...

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- 75) Ibid., p. 569. Spain did recognize the Netherlands as a sovereign state in 1648.
- 76) Ibid., p. 570. This was so despite the fact that Spain had concluded a treaty with Portugal in 1668. It is submitted that again the practice was equivocal because France, the Netherlands, England, Sweden and even Spain (in 1668) concluded treaties with Portugal. Ibid.
- 77) Ibid. The quality of the Swiss Cantons as subjects of international law even before the Treaty was not in doubt.
- 78) Pufendorf, De Jure Naturae et Gentium, 1672, Book VII, ch. VIII, 9; Bynkershoek, Quaestiones Juris Publici, Book II, ch. III; Paschalius, Legatis, XII; Vattel, Le Droit des Gens, Book IV, ch. V, §68; Moser, Grundsätze des jetzt üblichen Europäischen Völker-Rechts in Friedenszeiten, 1736, ch. V.
- 79) Moser, Die gerette to völlige Souverainete der Löblichen Schweitzerischen Eydgenossenschaft, 1731, p. 49.

the Holy Alliance but was discarded again after it.⁸⁰⁾ In 1907 it was incorporated into a Treaty between five central American Republics who undertook inter se not to recognize governments coming to power in an unconstitutional manner but this is the only expression of the doctrine in the last 120 years.⁸¹⁾

Today writers reject the doctrine of legitimacy. It is even alleged that it never formed part of international law.⁸²⁾ It is asserted that unconstitutionality in origin does not affect the existence of an entity.⁸³⁾ In addition the doctrine is rejected by case law.⁸⁴⁾ It is also in conflict with the liberty to revolt and secede which international law undoubtedly does not prohibit.⁸⁵⁾ Dean Acherson's statement on the doctrine of legitimacy and its application to Rhodesia is entirely apposite:

"International law does not proclaim the sanctity of British dominion over palm and pine." ⁸⁶⁾

We/...

80) Lauterpacht, pp. 26, 103.

81) Lauterpacht, p. 103; the writer, "Rhodesia: A Duty not to Recognise?" (33) T.H.R.-H.R., 1970, p.152 at p.157. It is always of course possible to incorporate such a doctrine into a treaty and it will then be operative inter partes. But such a particular treaty has of course no relevance in determining whether the doctrine is part of general international customary law - which is the question here.

82) Lauterpacht, p.26.

83) Ibid., pp. 26, 103; J.L. Kuntz, note 32) supra, p. 715; Crause, note 3) supra, p.330.

84) Dreyfus case, Franco-Chilean Arbitration, Descamps et Renault, Recueil International des Traites du XXe siècle, (1901) p.294; Republic of Peru v. Dreyfus Brothers and Co. (1888) L.R. Ch. D. 348, 355; Tinoco Arbitration, Great Britain v. Costa Rica, Ann. Dig., 1923-1924, Case no. 164, p. 247; George W. Hopkins case, United States v. Mexico, Ann. Dig., 1925-1926, Case no. 170, p. 232.

85) For discussion of the liberty to revolt see supra, pp. 137-142.

86) Letter to Washington Post, 11th December, 1966 reproduced in Chayys, II, at pp. 1379-1380. We might add of course that international law does proclaim British dominion over its territories as far as other states are concerned. But Acherson is right in that it does not proclaim it as far as the inhabitants of these territories are concerned. These have liberty to revolt and secede if they can do so.

We have seen the requirement of legitimacy in its traditional form and we have found it to be inapplicable. But a legitimacy requirement in a new form has recently been asserted.⁸⁷⁾ According to this view, a state can only emerge from the indigenous people of a territory. Thus:

"If a government emerges from other than the indigenous people it will not only be illegal, but will also be a government without a legal territory."

It is the indigenous people at the time of colonisation who count. If a government other than from a majority of the indigenous people emerges, the statehood has been "manipulated" and the manipulated state is not a true state for international law purposes.⁸⁸⁾ The argument is applied to Rhodesia and Rhodesia is found to be a manipulated state - an "illegal" state. This is in effect an argument that Rhodesia is not a state at all.⁸⁹⁾

With respect, it is submitted that there is no requirement of legitimacy in this new sense in international law either.

In the first place the requirement, if it exists, can only be based on the existence of a right of self-determination. There is no other authority for it. But the existence of a right of self-determination is extremely controversial in international law and it is to be doubted whether it is more than an aspiration.⁹⁰⁾ Even if its existence as a right were freely admitted, this would go no further than to establish a requirement of statehood such as "good government".⁹¹⁾ The requirement of "good government", if
established/...

87) Mahmoud, note 14) supra.

88) Ibid., pp. 70-71.

89) Ibid., pp. 99, 138-139.

90) The "right" of self-determination is discussed fully infra, pp. 42-163.

91) Discussed supra, pp. 157-163.

established, would be a narrower requirement than the concept of legitimacy at present under discussion in that (a) it is not stated to operate to protect indigenous people only and (b) it would require some place and say in government for minorities as well as majorities.⁹²⁾ As previously submitted, however, international law does not go so far as to admit the requirement of "good government".⁹³⁾ A fortiori it does not admit a concept of legitimacy in the sense at present attributed to it.

In the second place, the requirement of legitimacy in this sense would have the effect of nullifying the statehood of a large number of presently existing states.⁹⁴⁾

It is therefore submitted that the doctrine of legitimacy, either in this new sense or in its traditional sense does not furnish an additional requirement for statehood.

Some overall conclusions may now be expressed in the light of the preceding discussions. In the first place the requisites of statehood are the traditional requirements viz. people, territory and a government which is independent and effective in the traditional sense of

_____ exacting/...

92) Fawcett, note 49) supra, pp. 38-39.

93) Supra, pp. 157-163.

94) The statehood of the following would, for example, be affected and called into question; all states in the Americas, all states south of the Zambesi in Africa, Mauritius, Singapore, Fiji, Australia, New Zealand, Israel. Dr. Mahmoud applies his arguments principally to Rhodesia and Israel but it is submitted that, once admitted, their implications would be much wider.

exacting habitual obedience.⁹⁵⁾ Other requirements are either superfluous or are not established as a matter of international law. In the second place, Rhodesia has these traditional requirements of independent statehood.⁹⁶⁾ Finally, as a result of the above it is submitted that Rhodesia meets the test of independent statehood. It is, in fact, a state. The legal significance of this is that it has the capacity to be recognized as a full international person.⁹⁷⁾

SECTION III

RECOGNITION OF A STATE AS A PREREQUISITE FOR THE ENJOYMENT OF INTERNATIONAL PERSONALITY.

(1) General rules of recognition.

The device of recognition may be used for a variety of important purposes in the realm of international law.¹⁾ It may be used to create specific rights in a state.²⁾ It may be used to consolidate specific/...

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- 95) Crause's application of the requisites of statehood to Rhodesia is therefore correct. Note 3) supra, p. 330. See too A.J.G.M. Sanders, "Die Erkenning van State en Regerings" (33) T.H.R.-H.R., 1970, p. 259 at p. 263. If there exists a legislative body which makes laws, a judiciary which interprets and applies the laws and which has at its disposal a considerable force responsive to its will, there will undoubtedly be a government. Briggs, p. 71.
- 96) Fawcett, note 31) supra, p. 110; Fawcett (34) M.L.R., 1971, p. 417; Ijalaye, note 69) supra, p. 552.
- 97) "Quand une entité politique réunit et présente tous les caractères constitutifs d'un état, elle a l'aptitude nécessaire". René Le Normand, La Reconnaissance et ses Diverses Applications, Paris, 1899, p. 55.

1) See Lauterpacht, pp. 261-263.

2) Thus recognition of nationality bestowed by another State on an individual or corporation means that the recognizing State concedes to the other State the right to protect the individual or corporation in question on the international level. Nottebohm case, I.C.J. Rep., 1955, at 17-20; Barcelona Traction case, I.C.J. Rep. 1970, at para. 72.

specific rights which were formerly weak.³⁾ It may be used to validate that which would otherwise be illegal.⁴⁾ It may be used to establish a representative capacity.⁵⁾ Finally, recognition is intimately connected with the creation of international personality in various entities such as insurgents and belligerents,⁶⁾ international organisations and states. It is with the creation of international personality in the state, that we are here concerned.

(2) The principal theories on recognition.

The role of recognition in the creation of international personality is one of the most disputed topics in the ambit of international law. This divergence of opinion must therefore be analysed and opinions must be expressed on the nature of recognition and its function in the process of establishing international personality in the state.

There are two main theories on the nature and function of recognition. The Declaratory theory holds that statehood exists as an objective fact regardless of whether or not the state has been
recognized/...

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- 3) Thus territorial titles, though weak, may be recognized. Sir John Fisher Williams, "La doctrine de la reconnaissance en droit international et ses développements récents" (44) H.R., II, p.203 says at p.209 that the field of application of recognition is "... en relations avec les nouvelles situations de fait telles que celle résultant d'une annexion de territoire." See too the same writer in "Some Thoughts on the Doctrine of Recognition in International Law" (47) Harvard Law Review, 1933-1934, p. 776 at p.793. In the Eastern Greenland case (1933) P.C.I.J. Ser. A/B, No. 53 it was held at 68-69: "Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has debarred herself from contesting Danish sovereignty over the whole of Greenland." Schwarzenberger, I, p. 127 says recognition raises an estoppel. The recognizing state is estopped from disputing the right recognized.
- 4) Lauterpacht, p. 429; Sir John Fisher Williams, note 3) supra (44) H.R., II, p. 203 at p.204.
- 5) This is discussed infra, pp.409-412 in the context of recognition of the Government of Rhodesia.
- 6) This is discussed infra, pp.562-567 in the context of the possible rights of para-military forces operating in Rhodesia.

recognized. International personality can be enjoyed without recognition. The function of recognition is thus declaratory or evidentiary. It merely confirms a personality which already exists.⁷⁾ The Constitutive theory asserts that the objective indicia of statehood do not in themselves suffice to create international personality. Something further is required, viz. recognition. Recognition is a starting point of rights of statehood, of governmental capacity and of belligerency rights.⁸⁾

The Constitutive theory is essentially a conceptualist and positivistic approach. It starts from the basic premise that each legal system, including international law, must determine who its subjects are and at what point precisely personality exists in an entity.

In the sphere of international law there is no central organ which can pronounce capably on the existence of personality. It is therefore left to each state, i.e. each existing full international person, to determine when a new person exists. Each existing person performs this function by recognizing new entities.⁹⁾

Recognition is therefore constitutive of the personality of the new person. The Constitutive theory is positivistic in that it is based on the consent of states and the doctrine of sovereignty.¹⁰⁾

Recognition is a consensual act on the part of existing sovereign states so that the personality of new states depends upon the will of existing states. The Declaratory theory on the other hand is a Natural law doctrine which assumes an objective system of law apart from the assent of states.¹¹⁾ Just as there is respect for the personality/...

7) Fisher-Williams, note 4) supra, p. 238.

8) Lauterpacht, p. 370.

9) Briggs, pp. 113-114.

10) Chen, p. 18.

11) Ibid.

personality of the individual in municipal law because he exists, so too "le fondement du droit des gens" is "le respect de la personnalité collective qu'est la nation".¹²⁾ Accordingly the source of the rights of a state in international law is the fact of its actual supremacy within a specified territory over a specified portion of humanity, which enables it to exert physical pressure on all those who choose to disregard its rights.¹³⁾ In other words the source of rights and personality is the fact of existence. The Declaratory theory is also an idealistic theory:

"...il est certainement permis d'affirmer que, dans la ligne de la justice idéale, tout agrégat humain a, par le seul fait qu'il existe et qu'il présente certains caractères, des droits et des obligations a l'égard des autres agrégats" 14)

(3) Incompatibility of the theories.

Many writers try to evade making a choice between the two conflicting theories by asserting that the correct solution lies somewhere between them. A "middle of the road" or compromise approach is advocated.¹⁵⁾ It is submitted that the issue cannot be evaded in this way. A choice must be made between the two main conflicting theories. The basic difference between the two schools is this. According to the Constitutive theory, a state can only have rights and personality on recognition. According to the Declaratory theory it can have rights and personality though unrecognized. On this basic difference there can be no compromise. Either a

State/...

12) Le Normand, p. 57.

13) Chen, p. 3.

14) D. Anzilotti, Cours de Droit International (Tr. Gidel) Paris, 1929, I, p. 173.

15) See Sorensen, pp. 276-277; Whiteman, II, p. 21; Briggs, p. 114. These compromise approaches are discussed infra, pp. 265-270.

State can have personality and rights before recognition or it cannot.¹⁶⁾ For these reasons the present writer feels himself compelled to make a choice between the two theories after a careful examination of the respective arguments on both sides and an analysis of the "compromise" approaches.

(4) Adherents of the two theories.

The Constitutive theory is supported by Kelsen,¹⁷⁾ Oppenheim,¹⁸⁾ Lauterpacht,¹⁹⁾ Anzilotti,²⁰⁾ Quincy Wright,²¹⁾ Le Normand,²²⁾ Triepel, Liszt, Lawrence, Wheaton, Redslob, Bluntschli and Schwarzenberger.²³⁾ The Declaratory theory is supported by Borchard,²⁴⁾ Hall,²⁵⁾ Rivier,²⁶⁾ Fisher-Williams,²⁷⁾ Chen,²⁸⁾ Erich,²⁹⁾ Vattel, Westlake, Moore, Brierly, Fauchille, Fiori, Hyde, The Institute of International Law,³⁰⁾ the American Law Institute,³¹⁾ and Kidd.³²⁾

Of/...

- 16) Chen, p. 16 aptly summarizes this as follows: "The most important point of departure between the constitutive and declaratory theories lies in the question whether the legal personality of a state exists prior to recognition, that is to say, whether the unrecognized state can be a subject of international law, having capacity for rights and duties."
- 17) "Recognition in International Law, Theoretical Observations" (35) A.J.I.L. 1941, p.608.
- 18) I, p.121.
- 19) P. 320.
- 20) Note 14) supra, p. 161.
- 21) "The Chinese Recognition Problem" (49) A.J.I.L., 1955, p. 320 at p. 325. But he says that recognition of a new state is more constitutive and less declaratory than recognition of a new government in an old state.
- 22) P. 9.
- 23) See Whiteman, II, p. 20.
- 24) "Recognition in International Law" (36) A.J.I.L., 1942, p.110.
- 25) International Law, 8th ed., pp. 19-20.
- 26) Principes du Droit des Gens (1896) I. p.57.
- 27) Note 4) supra, pp. 236, 238; "Some Thoughts on the Doctrine of Recognition in International Law" (47) Harvard Law Review, p.776 at p. 778.
- 28) P. 4.
- 29) "La Naissance et la Reconnaissance des Etats", H.R., II (1926) p. 431 at pp. 459-461. The recognition of government and state is declaratory but the recognition of belligerents is constitutive.
- 30) For these and others see Whiteman, II, p. 21.
- 31) Restatement of the Foreign Relations Law of the United States, s.107, 108.
- 32) "Statehood and Recognition" (33) M.L.R., 1970, p. 99 at p.101.

Of the two theories the Declaratory theory is more popular among writers. Lauterpacht points out that the reason for this is the positivistic nature of the Constitutive theory as an assertion of sovereignty with its attendant arbitrariness.³³⁾

State practice would appear to be inconclusive in expressing a preference for one or the other theory. While Lauterpacht³⁴⁾ and Anzilotti³⁵⁾ assert that state practice supports the Constitutive theory, Kuntz makes the opposite assertion.³⁶⁾ One finds isolated instances in which states express views which support the Declaratory theory. The replies of Denmark and Switzerland to information requested by the Preparatory Committee for the Codification Conference of 1930 give an indication of the viewpoints of these states to the question. The Danish Government considered that it would not be right to make the responsibility of a state, from the standpoint of international law, depend on recognition by other states. Switzerland was of the view that a new state is bound to observe principles of international law even in its relations with those states which do not recognize it.³⁷⁾ Against this it would appear that the practice of the United Nations Secretariat supports the Constitutive theory.³⁸⁾ O'Connell remarks:

"... it becomes profitless when writers seek to prove from State practice that one or the other doctrine is positively adopted in international law. For every ounce of practice the constitutivist can put in the scales the declaratory theorist can add his ounce. And in any event the practice is usually ambiguously expressed." ³⁹⁾

The/...

33) Pp. 61-62.

34) P. 61.

35) Note 14) supra, p. 162.

36) "Critical Remarks on Lauterpacht's 'Recognition in International Law,'" (44) A.J.I.L., 1950, p. 713 at p. 717.

37) See Briggs, pp. 100-101.

38) O. Schacter, "The Development of International Law through the Legal Opinions of the United Nations Secretariat" (25) B.Y.I.L., 1948, p. 91 at pp. 109-115.

39) I, pp. 130-131.

The practice of the World Court on the dispute is also ambivalent. In Certain German Interests in Polish Upper Silesia, the Permanent Court of International Justice favours the Constitutive theory.⁴⁰⁾ In its Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations, the International Court held that the member states of the United Nations could create an international organization with objective international personality i.e. a personality effective against non-members and independent of recognition by such non-members - a personality valid erga omnes.⁴¹⁾

Since Rhodesia has all the characteristics of statehood,⁴²⁾ it follows that the dispute between the two theories is of vital importance in relation to its international status. For if the Declaratory theory is correct Rhodesia may have full international personality as an independent state even in the absence of recognition. On the other hand if the Constitutive theory is correct Rhodesia cannot have personality, rights or duties in international law in the absence of recognition.

In the specific context of the Rhodesian situation certain writers have already expressed views on the merits of the theories and these views also reflect the long-standing dispute.

David A. Ijalaye, who regards Rhodesia as having the traditional requirements of statehood, makes the constituvist assertion that:

"...recognition/...

40) (1926) P.C.I.J., Ser. A, No. 7 at 28. For criticism of this decision see Brownlie, p. 83.

41) I.C.J. Rep. 1949, at 174. For criticism of this see Schwarzenberger, I. p. 128 and Chen, p. 92 who describes it as a rather authoritarian interpretation of declaratory doctrine.

42) Supra, pp. 168-169.

"...recognition forms an integral part of that factual situation which must manifest itself before an entity can claim to have attained statehood in international law." 43)

G. N. Barrie considers the principle to be that a new state acquires personality by recognition - de facto or de iure. 44)

On the other hand the Declaratory theory has been supported by J.A. Coetzee and C.A.Crause. The theory is applied to Rhodesia and the logical conclusion is drawn that:

"Indien dit dan aanvaar word dat Rhodesië aan die basiese vereistes voldoen om as 'n staat te kwalifiseer, maak die feit dat Rhodesië nie deur ander state erken word nie, geen verskil daaraan dat Rhodesië 'n staat is en bly nie, en dat Rhodesië as sodanig behandel moet word nie." 45)

The writer interprets Crause as saying that Rhodesia is an international person with rights and duties as such and should be treated accordingly.

Similarly Sandars would appear to favour the Declaratory theory which he also brings to its logical conclusion.

"Rhodesië beantwoord ... aan al die volkeregtelike voorwaardes wat vir staatskarakter gestel word en is op krag daarvan volgens ons deklaratiewe uitgangspunt 'n volkeregtelike subjek." 46)

The/...

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- 43) "Was Biafra at any time a state in International Law?" (65) A.J.I.L., 1971, p. 551 at p. 552. Later however (p. 559) he doubts whether recognition of Biafra by five states only was sufficient to constitute Biafra an independent nation. Cf. the writer, "Rhodesia: A Duty not to Recognize" (33) T.H.R.-H.R., 1970, pp. 155-156 whose views coincide with those of Ijalaye in that recognition of Biafra was premature but differ in that a relative international personality available against the recognisers was considered to be constituted in Biafra.
- 44) "The High Court of Rhodesia and U.D.I." (30) T.H.R.-H.R., 1967, p.147.
- 45) "Enkele opmerkings oor Besluite van die Veiligheidsraad ten opsigte van Rhodesië" (29) T.H.R.-H.R., 1966, p. 320 at p. 332.
- 46) "Die Erkennings van State en Regerings" (33) T.H.R.-H.R., 1970, p. 259 at p. 263. See too ibid., pp. 261, 262.

The present writer formerly inclined towards the Declaratory theory but without real conviction.⁴⁷⁾ In order to ascertain the status of Rhodesia he now feels obliged to discuss the two theories fully and to express a conclusion in favour of one of them. In view of the fact that writers have argued for and against each theory, in view of the fact that state practice and the practice of international tribunals give no clear indications as to an appropriate solution, the approach will be to consider the merits and demerits of the arguments advanced on both sides, and of the compromise approaches, and to state a conclusion after a critical discussion of these matters.

(5) Arguments against the Constitutive theory and in favour of the Declaratory theory.

There are so many arguments to consider here that for the purpose of clarity and exposition an attempt is made to systematise them under the following headings: (a) Anomaly-orientated arguments; (b) Policy-orientated arguments; (c) Practicality-orientated arguments; (d) Historically-orientated arguments; (e) Conceptually-orientated arguments and (f) Arguments of a miscellaneous nature.

(a) Anomaly-orientated arguments.

Here it is proposed to deal with the following arguments:

- (i) States have no legal origin but a factual one;
- (ii) relations with a state are inevitable even before
recognition/...

⁴⁷⁾ "Status of Rhodesia in International Law", Acta Juridica, 1967, p. 39 at pp. 44-45. See the attitude of Sandars, note ⁴⁶⁾ supra, p. 260 to this. After further reflection the writer changed his views and expressed preference for the Constitutive theory. See "Does South Africa Recognize Rhodesian Independence?" (86) S.A.L.J., 1969, p. 438 and note ⁴³⁾ supra, p. 152.

recognition; (iii) the unrecognized state must observe international law; (iv) rights are conceded to the unrecognized state even before recognition; (v) recognition is sometimes afforded to the internal acts of an unrecognized entity; (vi) the argument based on the anomaly of two unrecognized states recognizing each other; (vii) constitutive recognition makes the recognized a delegated authority derived from the will of the recognizer and this is incompatible with the equality of states; (viii) since a non-sovereign state can be an international person, why cannot a sovereign but unrecognized state be so?

(1) States have no legal origin but a factual one.

The argument here stresses the anomaly which may result from the Constitutive theory being at variance with the factual position before recognition, viz. the existence of a state with no international law rights.⁴⁸⁾ The argument is that whether a state exists is a matter of fact, not of law.⁴⁹⁾ It is an exorable fact that a state may exist as a de facto regime and that its power may be exercised and felt even though it is not recognized.⁵⁰⁾ With these assertions the present writer is in general agreement but they do not help in the solution of the controversy/...

48) Briggs, pp. 66-67, 114.

49) Norms of international law do however determine the coming into existence of a state. See J.L. Kuntz, note 36) supra, p. 713. These are the rules which prescribe the criteria of statehood as to which see discussion supra, pp. 168-169. The criteria for the existence of statehood are therefore legal but whether in an individual case a particular entity complies with these norms or criteria is of course a question of fact.

50) E. Borchard, "Recognition and Non-Recognition" (36) A.J.I.L., 1942, p. 108 at p. 109; P. Marshall Brown, "The Legal Effects of Recognition" (44) A.J.I.L., 1950, p. 617 at p. 634.

controversy at all. The answer is that a clear distinction can be drawn between the concept of statehood and that of international personality. If, as a matter of objective fact, an entity possesses the legal criteria of independent statehood, it is certainly a state. It does not follow, however, that it is also an international person. In other words the origin of the independent state must be carefully divorced from the origin of the international person, though often, as a matter of historical coincidence, they may both arise simultaneously e.g. where a dependency is granted independence by its mother state, the statehood and personality of the former commence together. But this coincidence need not exist. The reason is that the international law norms which govern the existence of statehood⁵¹⁾ are different from the norms which govern the creation of international personality.⁵²⁾ If there is compliance with the former norms only, the entity will be a state, but not an international person.⁵³⁾

This/...

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- 51) For the norms which establish the criteria of statehood, see supra, footnote 49).
- 52) According to the Constitutive theory this is the norm requiring recognition and perhaps also the norms establishing the criteria of statehood though it may be possible to have full international personality existing in an entity which is not an independent state. "If the regime recognized lacks the essentials of a state, to recognize it is to constitute it a subject of international law." Sorensen, p. 278. Sed contra Sandars, note 46) supra, p. 260. The net point is whether full international personality has two ingredients, viz. (i) recognition and (ii) the criteria of statehood, or one ingredient only - recognition.
- 53) The distinction between "natural" statehood and membership of the international community was first clearly brought to light by G. Jellinek, Die Lehre von den Staatenverbindungen, Vienna, 1882, pp. 92-99 and Die Rechtliche Natur der Staatenverträge, Vienna, 1880, p. 48. See too F. von Liszt, Das Völkerrecht, 12th ed., 1925, p. 91 and Oppenheim, International Law, 3rd ed., 1920, I, §71.

This distinction between statehood and international personality has been criticised. It is asserted that even the most convinced constituvists do not claim that recognition creates the state. Hence a distinction between statehood and international personality must be drawn by constituvists.⁵⁴⁾ The argument then proceeds that international law (even according to the constituvists) concedes that the state is in existence independently of recognition.⁵⁵⁾ The question is then posed as to what legal significance this "existence" has if the state is not an international person.

It must of course be conceded that the state does exist objectively in international law independent of recognition. It is an entity with legal significance. This is so because it has complied with the criteria which international law prescribes for the existence of statehood. What then is the legal relevance of this "existence" in international law of a state which has no rights and duties in the system? It is submitted that the relevance is as follows. An entity which is legally a state has the capacity to be recognized.⁵⁶⁾ When recognition follows, that entity, previously existing in the legal system but without rights, now acquires rights in the system and becomes a person in the system. Recognition does/...

54) Chen, p. 30.

55) Chen, p. 31.

56) This was in fact the submission which we made in respect of Rhodesia in the previous section as a result of the view that it was a state. Supra, p. 169.

does indeed operate on an entity which legally exists and gives that entity rights and, as a result, personality.⁵⁷⁾ A distinction must therefore be drawn between the position of the entity prior to an subsequent to recognition. The distinction is that between statehood and international personality.

To clarify the above an analogy might be drawn between the position of the unrecognized state in international law and that of the slave in Roman law. The slave existed as a legal institution. The law recognized him as a human person but gave him no rights. From the fact that he was a human person (as defined by the law) he had the capacity to be manumitted in which event he enjoyed rights and duties. But his legal personality dated from his manumission only. Before that he was an entity in the system without rights.

(11) Relations with a state are inevitable even before recognition.

It is common knowledge that all kinds of relations may exist between a state and another state which it does not recognize.⁵⁸⁾ Thus it is not only possible for states to have "unofficial" relations with the unrecognized entity⁵⁹⁾ such as commercial relations/...

57) This in effect answers the point raised by Lauterpacht, pp. 40-41 that a unilateral act such as recognition, if it is to have juridical effects, must operate on an entity which already exists within the legal system in question.

58) Briggs, pp. 114-115; Chen, p. 37; Marshall Brown, note 50) supra, p. 362; M. Lachs, "Recognition and Modern Methods of International Co-operation" (35) B.Y.I.L., 1959, p. 252 at p. 256; Herbert W. Briggs, "Recognition of States: Some Reflections on Doctrine and Practice" (43) A.J.I.L., 1949, p. 113 at p. 117.

59) Ibid.

relations, but in addition official relations, relations officieuses, political relations, representative relations and even diplomatic and consular relations.⁶⁰⁾ In addition an unrecognized state might conclude bilateral agreements with states which do not recognize it,⁶¹⁾ participate in multilateral agreements to which its non-recognizers are parties⁶²⁾ and become a member of international organizations in which its non-recognizers are also members.⁶³⁾

In the event of the above relations, or any of them, existing with a state which has not been expressly recognized, there are two possibilities. (A).

Recognition is implied from the existence of the relations in question or from one or more of them.

(B) Recognition cannot be implied from any of the relations in question. We must now discuss each of these possibilities in turn.

(A) If recognition can be implied from the existence of the relations the position is that the entity

is/...

60) Chen, pp. 216, 217.

61) B.R.Bot, Non Recognition and Treaty Relations, Leiden, 1968, p.30; Briggs, note 58) supra, p. 117. For early examples see Jochen A. Frowein, "Transfer or Recognition of Sovereignty - Some early problems in connection with Dependent Territories " (65) A.J.I.L., 1971, pp. 568-570. Lachs, note 58) supra points out that since the nineteen twenties there has been an ever-growing number of bilateral agreements concluded on all sorts of matters between states which do not recognize one another.

62) Bot, note 61) supra, p. 30; Lachs, note 58) supra, pp. 253-259.

63) Lauterpacht, pp. 402-403; Kelsen, note 17) supra, p. 614.

is now an international person by virtue of the implied recognition in question.⁶⁴⁾ While on this topic of implied recognition we shall briefly discuss the circumstances in which recognition may be implied from common participation in multilateral treaties and international organizations.⁶⁵⁾ The general principles applicable to implied recognition stress that intention is paramount and that recognition will not lightly be implied.⁶⁶⁾ If an intention to recognize can be gleaned from participation in a multilateral treaty, then there will be recognition. The general rule of thumb, however, is that participation in a multi-lateral treaty does not imply recognition⁶⁷⁾ (unless of course an intention to recognize is clearly present). There are however two cases in which recognition may be implied from mere participation in a multilateral treaty: (i) where there is simultaneous signing of the treaty rather than subsequent adherence to the treaty by the unrecognized state;⁶⁸⁾ (ii) where the unrecognized state/...

64) The recognition implied need not necessarily be full de iure recognition but might be limited in scope. The distinction between full and limited recognition and the scope of the latter are discussed infra, pp. 184-188, 198-208, 238, 279-280.

65) The circumstances in which recognition may be implied from all the other relations mentioned above is fully discussed infra, pp. 344-365.

66) Infra, pp. 342-344.

67) Lauterpacht, p. 374; Bot, note 61) supra, p. 30.

68) Chen, p. 204.

state adheres to a "closed" convention.⁶⁹⁾ In both of these cases there is a strong presumption in favour of recognition (but it can of course be displaced by showing a contrary intention). If no intention to recognize fully can be implied, an intention to bestow a limited recognition might still be implied. Here recognition would be limited to bestowing personality on the "unrecognized" entity for the purposes of participation in the multilateral treaty and enjoying rights and duties thereunder only.⁷⁰⁾ Finally, there may be an intention not to accord any kind of recognition, either full or limited to the state which participates in a multilateral treaty to which its non-recognizer is also a party. The non-recognizing state might specifically declare its non-recognition thus rebutting any implication of recognition. It might for instance state ex abundanti cautela that participation is not to be interpreted as recognition; it might refuse to admit the non-recognized to any participation in the treaty with it; it might refuse to accept any obligations resulting from the treaty in its relations with/...

69) Ibid., pp. 204-205; Bot, note 61) supra, p. 31. If the consent of the original signatories is necessary for subsequent adherence to the treaty by other states, the treaty in question is "closed", otherwise it is open. Ibid.; Chen, pp. 204-205.

70) There is an admission of the treaty-making capacity of the "unrecognized" and recognition for the purposes of the treaty in question. See Chen, p. 193 and Lachs, note 58) supra, p. 258. On the concept of limited as opposed to full (i.e. de iure) recognition see discussion infra, pp. 184-188, 198-208, 238, 279-280.

with the unrecognized.⁷¹⁾ In all these cases where there is no recognition, there will be no relations under the multilateral treaty between the unrecognized and its non-recognizer but there will be relations between the unrecognized and other parties to the treaty which do recognize it.⁷²⁾

In general the same rules and principles govern the question of implied recognition when an unrecognized state becomes a member of an international organization. Though full recognition can be implied from admission to such membership, the general rule is that admission does not imply such recognition.⁷³⁾ Limited recognition for the purpose only of enjoying the rights and duties incidental to membership of the international organization might be implied. Thus Kelsen asserts that a state admitted to membership of the League of Nations got the rights and duties in the Covenant of the League against its non-recognizers.⁷⁴⁾ The Secretary-

General/...

71) Lachs, note 58) supra, pp. 256-257.

72) As Lauterpacht, p. 372 points out there is no compelling reason why there should be contractual relations between each contracting party and all other signatories. Thus though East Germany is an accessionary to many multilateral treaties the United Kingdom refuses to recognize this. For a list of these treaties see O'Connell, I, p. 287.

73) Lauterpacht, p. 93.

74) Note 17) supra, p. 614. But in relation to the admission of a state to the United Nations, he would appear to take the view that it implies full recognition. See The Law of the United Nations, London, 1951, p. 947.

General of the United Nations advocated the doctrine that admission to the United Nations is a collective act which is distinct from the recognition of each of the member states.⁷⁵⁾ Dependent states are sometimes admitted to international organizations. Here there cannot be full recognition of the dependency but there must of necessity be a limited recognition for the purposes of enjoying the rights and duties of a member of the international organization in question.⁷⁶⁾ This is of particular significance to Rhodesia which, as a dependency, was a member of several international organizations and still continues to hold such memberships.⁷⁷⁾

Chen poses an interesting question in relation to the implication of recognition from admission to an international organization. If admission amounts to recognition, would that recognition be considered withdrawn if the state in question ceased to be a member?⁷⁸⁾ If the recognition implied was full recognition, it would continue despite cessation of membership as de iure recognition, once accorded, cannot as a general

rule/...

75) Ibid.

76) Lachs, note 58) supra, p. 255.

77) Supra, pp.105-106; Infra, pp. 380-382.

78) Chen, p. 213

rule be withdrawn.⁷⁹⁾ On the other hand if the recognition implied were limited, it is submitted that it could be withdrawn.⁸⁰⁾

Finally the admission of a state to an international organization might not imply any form of recognition if the intention not to recognize in any way is quite clear. Thus Switzerland and Belgium expressly assented their continued non-recognition of the Soviet Union and their right to do so was not challenged by other members of the League.⁸¹⁾ Great Britain adopted the same attitude to Lithuania when it was admitted to the League of Nations.⁸²⁾ The admission of Israel suggests that existing members do not regard membership of the United Nations as automatically entailing recognition.⁸³⁾

We must note however Kelsen's assertion that limited recognition was necessarily implied from admission of a state to the League of Nations, the reason being that the members of the League had transferred their competence to recognize to the organs of the League but the

transfer/...

79) Starke, p. 153.

80) De facto recognition, a relatively comprehensive form of limited recognition, can, in principle, be withdrawn; Starke, p.158. A fortiori other forms of less comprehensive limited recognition can be withdrawn.

81) Lauterpacht, p. 402.

82) Ibid., p. 403.

83) Chen, p. 215.

transfer was limited to the question whether a state should be admitted to membership.⁸⁴⁾ In relation to admission to the United Nations he would appear to favour an implication of full recognition.⁸⁵⁾

- (B) The second possibility is that recognition of a state cannot be implied from any of the relations subsisting with it.

In this case the relations are simply not governed by international law. Neither the unrecognized state nor the non-recognizing state has any rights or duties in respect of such relations. Even if agreements subsist these do not create international law obligations. They are either mere "gentleman's" agreements or contracts under some municipal law system. Which of these exist depends naturally on the intentions of the parties.⁸⁶⁾

The relations which exist before recognition have been described, and it is submitted, correctly, as being de facto intercourse.⁸⁷⁾

They/...

84) Note 17), supra, p. 614.

85) Note 74), supra, p. 947. Chen, p. 213 would appear to hold similar views but concedes that this is at variance with practice which illustrates that in several cases states have insisted on the right to withhold recognition from a new member of an organization.

86) For discussion of the possibilities where the agreement does not create international law obligations see infra, pp. 357-360.

87) Lauterpacht, p. 347. De facto intercourse must be distinguished from de facto recognition. The former subsists before recognition. The latter is a species of limited recognition which does create international personality so that resulting relations after de facto recognition may be legal (i.e. international law) relations.

They are not governed by international law and there is thus no anomaly.

Marshall Brown says that the problem concerning relations is to determine the nature and extent of such relations.⁸⁸⁾ This is an apt summary of the problem. As far as the nature of such relations is concerned we must establish whether there is recognition or not. If there is no recognition the relations amount to de facto intercourse only. If there is recognition, the relations may be legal, i.e. governed by international law. To establish the extent of such legal relations we have to enquire into the extent of the recognition accorded, to see whether it is full de iure recognition or limited recognition, and if the latter, the precise extent of such recognition.

(iii) The unrecognized state must observe international law.

This argument in effect says that since an unrecognized state has duties under international law it is an international person.⁸⁹⁾ Therefore personality does not stem from recognition in this case and the Constitutive theory is incorrect.

By/...

88) Note 50) supra, p. 632.

89) Brownlie, p. 83; Briggs, p. 115; Sorensen, pp. 269-270; Whiteman, II, p. 648; Herbert W. Briggs, "Recognition of States: Some Reflections on Doctrine and Practice" (43) A.J.I.L., 1949, p. 113 at p.118. Naturally claims may be made against such unrecognized states for breaches of international law.

By way of preliminary observation one may be permitted to remark that if this rule exists in international law it would appear to be unnecessary. A state need never be prejudiced by the conduct of an unrecognized state, and if it is prejudiced, the remedy lies in its own hands. All it has to do is to accord recognition to the unrecognized state and the latter will then be fully bound by the rules of international law in its relations with its recognizer.⁹⁰⁾ To avoid prejudice the state need only bring the legal position into line with the effective facts by according recognition. If it is unwilling to do this, it should have to bear the consequences of the legal vacuum, viz. that the unrecognized state owes it no obligations.

Four points now arise for consideration in relation to the above-stated rule:

- (A) Has this rule established itself in international law?
 - (B) If so, when do these duties actually exist?
 - (C) How can the existence of such duties be explained juristically?
 - (D) What is the extent of personality in these cases?
- (A) If the rule has established itself, it must have done so by operation of the custom-forming process.

The general practice of states must admit the possibility/...

90) A possible exception might be where there is a duty not to recognize a particular state. See infra, pp. 295 et seqq.

possibility of an unrecognized state being bound by international law and the general view should be that this is legally possible - the opinio juris sive necessitatis. A general practice would appear to involve continuity, in that it should emanate from a multiplicity of precedents, and extensiveness, in that it should emanate from the practice of a sufficient number of states to be representative of the community of nations.⁹¹⁾ There is certainly evidence of state practice in which international claims have been proffered against unrecognized states.⁹²⁾ In modern/...

91) Sorensen, pp. 130-132.

92) That states may present claims against unrecognized entities is recognized by British practice, though originally the British view was that this was not possible. Whiteman, II, p.649. There are also examples of United States claims against unrecognized regimes, e.g. when a British aircraft was shot down by the Communist Chinese over the High Seas in 1954 with loss of United States lives, Secretary of State Dulles stated that the Chinese must be held responsible. The regime at Peking was informed that the United States reserved the right to present claims as the act was "illegal and wrongful" and an "illegal attack". The Chinese authorities could not "under established international law" dispose of their responsibility. The Department of State said it was necessary to invoke "universally recognized rules of international law" and that the act constituted "a wrong to the United States ... in violation of international law ... for which the United States demands redress". The Chinese expressed regret and sympathy and paid a lump sum for compensation. In the George W. Hopkins Claim, United States-Mexican Claims Commission, it was held that the United States could make claims against Mexico arising out of the conduct of the Huerta government which it had not recognized. On the above see Whiteman, II, pp. 650-653. On 9th May, 1922 the United States protested to the authorities of unrecognized Albania for depriving Americans of their passports and forcing Albanian passports on them. See Briggs, note 89) supra, p.118.

modern times the most pertinent examples are United States charges against North Vietnam and Arab charges against Israel.⁹³⁾ The latter call for some particular comment as they have been the subject matter of proceedings at the United Nations and they therefore afford an opportunity to establish general practice and views concerning the matter at issue. When the June, 1967, "Six-day" War, took place the Security Council of the United Nations had the opportunity to express its views on the matter and it passed five resolutions.⁹⁴⁾ Two of these resolutions throw some light on the matter at hand. After a cease-fire had been arranged between Israel and Syria the Security Council passed a resolution in which it condemned "any and all violations of the cease fire".⁹⁵⁾ This, it is submitted, indicates that in the view of the Council, Israel has a duty to Syria to observe the cease-fire. Later the Security Council considered:

"... that all obligations of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August, 1949 should be complied with by the parties involved in the conflict." ⁹⁶⁾

This is a very clear indication that the Council is of the view that Israel has duties to the Arab States/...

93) Brownlie, p. 83. Israel is a member of the United Nations and yet is unrecognized by the Arab States, also members. Chen, p. 215.

94) S. Res. 233 (1967); 234 (1967); 235 (1967); 236 (1967); 237 (1967).

95) S. Res. 236 (1967) paragraph 1.

96) S. Res. 237 (1967).

states under the Convention in question.⁹⁷⁾ Some three weeks later the General Assembly welcomed the latter resolution of the Security Council and expressed its views on the applicability of the above Convention to the parties involved in the conflict.⁹⁸⁾ This resolution, it is submitted, is extremely relevant because it was passed by an affirmative vote of 116 states and what is more important there was no opposition to it. This clearly means that it is the near-universal view that Israel, an unrecognized state, owes certain duties under the Convention in question to the Arab states which do not recognize it.

The General Assembly also expressed the view that Israel has a duty not to change the status of Jerusalem.⁹⁹⁾ This resolution is not such overwhelming evidence of view as the previous one because although it did not encounter any opposition there were twenty abstentions in voting. It does however, add to the weight of the available evidence. The Security Council, almost a year later, recalled the Assembly resolution and expressed similar views in which it considered:

"...that all legislative and administrative measures and actions taken by Israel, including expropriation of land and properties thereon, which tend to change the legal status of Jerusalem are invalid and cannot change that status"

and/...

97) U.N.T.S , Vol. 75 (1950), No. 972.

98) A. Res. 2252, 4th July, 1967, paragraph 1 (d).

99) A. Res. 2253, 4th July, 1967, paragraph 2.

and urgently called upon Israel

"to rescind all such measures already taken and to desist forthwith from taking any further action which tends to change the status of Jerusalem." 100)

Thus in the view of the Council (in which there was no opposition to the motion) Israel has not only a duty not to take such measures but also to rescind those already taken.

It is clear too that the views of individual states and groups of states reflect the above expressed views. The U.S.S.R. presented a draft resolution to the General Assembly demanding that Israel should unconditionally withdraw its forces, respect the status of the demilitarized zones as prescribed in the armistice agreements, make good all damage inflicted by its "aggression" and return all seized property.¹⁰¹⁾ It can be cogently argued that this draft supports the contention that the Soviet view would regard Israel as having international law obligations to the Arab States in the above respects. The U.S.A. also presented a draft resolution which called on the parties inter alia to scrupulously observe the cease-fire.¹⁰²⁾ This, it is submitted, means that the U.S.A. regards all parties as having international/...

100) S. Res. 252 (1968), paragraphs 2, 3.

101) For text of the draft resolution (which was not adopted, nor was any single paragraph thereof adopted though the paragraphs were voted upon individually) see (6) I.L.M., 1967, pp. 837-838.

102) For text of draft resolution (which was not put to a vote because the U.S.A. did not press for a vote on it) see (6) I.L.M., 1967, p. 839.

international obligations to each other here. Further resolutions were also presented by Albania,¹⁰³⁾ Afganistan and sixteen other Afro-Asian states¹⁰⁴⁾ and twenty Latin-American States.¹⁰⁵⁾ From these resolutions it may also be concluded that in the view of the respective proposers Israel may have international law duties to the Arab States.

The conclusion from the examination of the above material is that there is very weighty evidence in favour of the view that an unrecognized state may have international law duties. In fact it would appear to be the general view that such a customary rule exists. It is significant that in all the resolutions and draft resolutions relating to the Middle East situation referred to above, Israel's lack of recognition is not once mentioned. It is simply assumed automatically that Israel is the bearer of duties towards the Arab States (and that it has even broken some of them). The rule would also appear to reflect the practice of states in general including the more important powers. The writer's submission, therefore, is that an unrecognized state may be the bearer of duties towards those states which do not recognize it.

(B)/...

103) For text of draft resolution (which was not adopted though it received twenty-two votes in its favour) see ibid., pp. 840-841.

104) For text of draft resolution (which was not adopted though it received fifty-three votes in its favour) see ibid., pp. 842-843.

105) For text of draft resolution (which was not adopted though it received fifty-seven votes in its favour) see ibid., pp. 844-845.

(B) We have just argued that in principle an unrecognised state may have duties. However, these duties, it is submitted, are not automatic and so the question arises as to precisely when such duties may be said to exist in an individual case. Lauterpacht's view that

"...there is no objection to treating the unrecognized state as if it were bound by obligations of international law ... if the non-recognizing state acknowledges itself to be bound by them."¹⁰⁶

describes the conditions which must be fulfilled before the unrecognized state has international duties in an individual instance. These are: (1) the state must be treated as if it had obligations. This treatment must be accorded by the non-recognizer. The latter will therefore call upon the unrecognized state to observe certain international law duties towards it or it will complain that the unrecognized state has not observed such duties towards it. Such a complaint, it is submitted, might be directed either to the unrecognized entity or to some body with power to deliberate or adjudicate on the subject matter of the dispute e.g. the General Assembly or the Security Council of the United Nations or the 'International Court of Justice'. It is submitted that Arab charges against Israel and United States charges against North Vietnam amount to such complaints.¹⁰⁷ In the absence of/...

¹⁰⁶) P.54.

¹⁰⁷) Also the other instances mentioned in footnote 92) supra.

of such a call or such a complaint, the unrecognized state has no duties to its non-recognizers because it has not been treated by them as if it had international obligations. (11) The non-recognizing state must acknowledge itself to be bound by such duties. This is no more than the application of a principle of reciprocity. The non-recognizing state may impose international law duties on the non-recognized state without according formal or full recognition to it but the price of this is the assumption of reciprocal duties to the non-recognized state and, of course, the concession of the correlative rights to the unrecognized state.¹⁰⁸⁾ This results in an inevitable concession of some international personality to the unrecognized state but not even this need be conceded if the non-recognizing state does not treat the unrecognized state as having international obligations. In the latter event it cannot complain about the conduct of the unrecognized state towards it for it cannot assume rights without undertaking corresponding duties.

- (C) We have now described the conditions under which an unrecognized state was submitted to have duties (and corresponding rights). In such a position the entity will have an international personality and it is now our/...

108) On reciprocity in relation to recognition see Le Normand, p.60.

our task to explain this personality juristically. It is undoubted that here there is no full recognition, either express or implied, of the state in question and that is why we have referred to it as the "unrecognized state". It is submitted however, that when the matter is analysed closely there is a form of limited recognition here. The recognition is limited because it only concedes the capacity to be the bearer of a limited number of rights and duties. Full recognition would, by way of contrast, concede the capacity to be the bearer of all conceivable rights and duties in international law vis-à-vis the recognizer. Recognition whether full or limited, is a consensual act¹⁰⁹⁾ and as such it must be either expressly granted or must be implied¹¹⁰⁾ from some conduct on the part of the state alleged to have accorded the recognition. In the case under consideration limited recognition is necessarily implied from the conduct of the non-recognizing state in calling upon the unrecognized state to observe rules of international law or in complaining that it has not done so. This implied but limited recognition juristically explains the international personality residing in the state which has not been formally recognized.

There is, it is submitted, much evidence in favour of the proposition that recognition can be limited.

Lauterpacht/...

109) Schwarzenberger, Manual, p. 171 describes it as a unilateral consensual act.

110) Schwarzenberger, I, p.128.

Lauterpacht states the position correctly when he says that the necessities of international intercourse do not favour a rigid dichotomy between full and no recognition.¹¹¹⁾ Limited recognition is possible and this idea has been described in various ways. Thus it is said that there can be recognition for certain purposes only,¹¹²⁾ there can be a concession of certain faculties to an unrecognized state,¹¹³⁾ there can be a pro tanto admission of the capacity of an unrecognized state while refusing recognition for other purposes,¹¹⁴⁾ there can be partial recognition¹¹⁵⁾ and limited recognition.¹¹⁶⁾ There is in other words, no implication that the limited relations which exist prior to full recognition are not governed by international law.¹¹⁷⁾ When there is partial recognition the recognized does not have the capacity of an equal member of the international community.¹¹⁸⁾

We may also add that established categories of such limited or partial recognition with a crystallized content have appeared. Thus in former centuries three

different/...

111) P. 347.

112) Lauterpacht, p. 54; Le Normand, p. 74.

113) Lauterpacht, p. 375.

114) Ibid.

115) "Une reconnaissance partielle ou limitée dans le temps." A. Raestad, "La Reconnaissance internationale des nouveaux états et des nouveaux gouvernements" (17) Revue de Droit International et de Legislation Comparée, 1936, p. 257 at p. 284.

116) Schwarzenberger, I, p. 459.

117) Briggs, note 89) supra, at p. 120.

118) R. Erich, "La Naissance et la Reconnaissance des Etats" (3) H.R., 1926, p. 431 at p. 464.

different degrees of recognition were accorded depending on whether the community was regarded as civilized, barbarous or savage, the latter two being species of partial recognition.¹¹⁹⁾ Today de facto recognition is in effect an established category of partial or limited recognition with a crystallized content. Thus de facto recognition is provisional in nature, is liable to be withdrawn and is limited to certain juridical relations.¹²⁰⁾ The limited nature of de facto recognition is often illustrated by contrasting it with de iure recognition which is full or complete recognition for all purposes of international law.¹²¹⁾ Thus de facto recognition is like de iure recognition in that both depend upon intention, express or implied,¹²²⁾ both are forms of legal recognition and thus create personality,¹²³⁾ the entity recognized has jurisdictional immunities in both cases,¹²⁴⁾ internal acts may be recognized as valid in both cases,¹²⁵⁾ in both cases recognition may be retrospective.¹²⁶⁾ On the other hand de facto recognition is/...

119) Le Normand, p. 63.

120) Lauterpacht, p. 338; Institute de droit International, Resolutions Concerning the Recognition of New States and New Governments, Art.3. For text see (30) A.J.I.L., 1936, supp. p. 185.

121) Ibid.; G.N.Barrie, "The High Court of Rhodesia and U.D.I." (30) T.H.R.-H.R., 1967, p.147.

122) Institute de Droit International, note 120) supra, Arts. 3, 9.

123) Barrie, note 121) supra, p. 147. Kelsen, note 17) supra, p.612. The latter goes so far as to say (p.613) that the distinction between de facto and de iure recognition has no importance from a juristic point of view, that the effects of de facto recognition are the same as those of de iure recognition. If this is so de facto recognition would be full recognition. But practice establishes that it is limited in certain respects.

124) The Gagara [1919] P.95; The Arantzazu Mendi [1939] A.C.256.

125) Luther v. Sagor [1919] 3 K.B. 532.

126) Luther's case, note 125) supra. Sed contra Oetjen v. Central Leather Company (1918) 246 U.S. 302. Lauterpacht, p.342 points out however that the limitation of retroactivity to de iure recognition in the latter case was unintentional.

is more limited than de iure recognition in that the entity so recognized is not normally accorded succession rights¹²⁷⁾ and diplomatic immunities.¹²⁸⁾ Such recognition does not carry with it full and normal diplomatic intercourse.¹²⁹⁾ Thus it would appear that the international personality of the state recognized de facto is limited because a limited form of recognition has been accorded to it.¹³⁰⁾

- (D) We have now submitted that a limited personality flows from an implied but limited recognition when a state treats another state which it has not fully recognized as being subject to international law obligations. It now remains to consider the extent of the resultant limited personality about which there appears to be some doubt. It has been asserted that the non-recognized state (or government) is bound to observe universally/...

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- 127) Haile Selassie v. Cable and Wireless Ltd. (No.2) [1939] Ch.182; Union of Soviet Socialist Republics v. Onou, Ann. Dig., 1925-1926, case no. 74, p. 96; Union of Soviet Socialist Republics v. Balaiew, ibid., case no. 123, p. 172.
- 128) Fenton Textile Association v. Krassin (1922) 38 T.L.R. 260.
- 129) Ibid. As Kelsen, note 17) supra, p. 612 points out this factor is juristically irrelevant because there is in any event no international obligation to establish diplomatic relations with a fully recognized state.
- 130) For a summary of the principal restrictions on the rights of a state recognized de facto see Starke, pp. 156-158; Sorensen, pp. 277-278. The whole institution of de facto recognition is criticised by Kelsen, note 17 supra, pp. 612-613. See note 123 supra, for the criticism. It is also attacked by Baty, "Abuse of Terms: 'Recognition': 'War'" (30) A.J.I.L., 1936, p. 377 as follows. "This desire of politicians to create a new status of de facto states with truncated rights, unknown powers and undefined responsibilities, is a phenomenon of this illogical twentieth century." This criticism, it is submitted, goes too far. The limitations on the rights of a state recognized de facto have crystallized into fairly definite categories and apart from these limitations, the rights of a state recognized de facto are the same as those of a state recognized de iure.

universally recognized rules of international law.¹³¹⁾

Presumably the personality would not be so extensive here as to bind the state by rules of general international law¹³²⁾ or regional customary international law.¹³³⁾

There are, it is submitted, difficulties in the path of accepting the above view. In the first place, assume that the non-recognizing state calls upon the unrecognized state to observe a rule of general or regional international law (as opposed to universal law). Does this mean that the call in question will be completely ineffective because the unrecognized state will thereupon obtain a personality which will bind it to the observance of universal norms only?¹³⁴⁾ In the second place such a result may militate against the intentions of the non-recognizing state. The non-recognizing state may call upon the unrecognized state to observe a single norm of international law. Its intention may be to impose rights and duties in

relation/...

131) Sorensen, pp. 269-270; Lauterpacht, p. 54.

132) In view of the possible application of the doctrine of persistent opposition in the custom-forming process (see Sorensen, pp.136-137) it is submitted that one must draw a distinction between rules of universal customary law and rules of general customary law. The latter bind the great majority of states which are representative of the world community as a whole but they do not bind all states. The former bind universally without exception.

133) Asylum Case (1950) I.C.J. Rep. 266.

134) Lauterpacht, p. 54 seems to be of the view that the unrecognized state may only be treated as being bound by obligations which are so compelling as to be universally admitted.

relation to that particular norm only. We have already submitted that this call will in fact be a form of implied but limited recognition. Since, as pointed out too, recognition is an essentially consensual act, its scope and effects must be determined in accordance with intention.¹³⁵⁾ As such, a construction which militates against the intentions of the recognizer by according a status in which the entity would be subject to all duties of a universal nature, instead of the single duty intended, is unacceptable.

The only acceptable solution lies, it is submitted, in relating the extent of personality conceded to the intentions of the state which treats the unrecognized state as if it were bound by certain norms of international law. The unrecognized state will have duties to observe the particular norms which it is called upon to observe, or about the infringement of which a complaint has been made, and no further.¹³⁶⁾ The unrecognized state will naturally/...

135) Intention is paramount in relation to recognition. Lauterpacht, pp. 369, 370, 371, 372, 378; Bot, note 61) supra, p. 32; Institute de Droit International, note 120 supra, Arts, 4, 9. See too discussion infra, pp. 342-343 where the question of implied recognition of Rhodesia is considered.

136) "... a situation is thus created in which the unrecognized community is treated for some purposes as if it were a subject of international law, namely to the extent to which existing states elect to treat it as such ..." Lauterpacht, p. 54. It enjoys personality to the extent that this is conceded by other states. Ibid., p. 375. D. Anzilotti, Cours de Droit International (Tr. Gidel) Paris, 1929, I, says at p. 171 "... la reconnaissance est susceptible d'effets assez différents qui dependent de la volonté des parties ...", and at p. 173, "les effets de la reconnaissance sont donc tous ceux, et seulement ceux, qui ont été voulus par les parties."

naturally have the benefit of these norms and so will enjoy corresponding rights. It does not matter whether the norms in question are norms of a universal, general or regional character provided only that the unrecognized state would be bound by them were it fully recognized.¹³⁷⁾ The non-recognizing state may at any time extend personality by treating the unrecognized entity as if it were bound by further norms of international law. The non-recognizing state cannot be prejudiced here because it lies solely in its discretion whether to extend the personality and if so in what direction and to what degree. It cannot complain however, about any conduct by the unrecognized entity which is not related to the norms for the observance of which it has called. The personality of the unrecognized entity will only expand into a full personality when it is accorded full recognition which may be express or implied.¹³⁸⁾ This theoretical construction is, it

is/...

137) Thus for instance, calling upon an entity to observe the provisions of a treaty to which it was not a party would, it is submitted, be completely ineffective as a form of limited and implied recognition because even if the entity were fully recognized it would not be bound by such norms.

138) Thus when a state which was formerly recognized de facto, is recognized de iure its personality expands into a full international personality. See Barrie, note 121) supra, p. 147. This too explains the position of Albania with which the United States concluded a most-favoured nation agreement by exchange of notes on June 23rd and 25th, 1922 and to which the United States protested on account of deprivation of the passports of American citizens on 9th May, 1922 but which was not recognized by the United States until the 28th July, 1922. See Briggs, note 89) supra, p. 118. Before 28th July, 1922 recognition of Albanian personality was limited to the norms about which the United States protested and to those in the agreement in question. On 28th July, 1922 Albanian personality became complete when full recognition was accorded.

is submitted, in accordance with the practice of Foreign offices which, in the words of Briggs

"... have ... regarded recognition as extending the scope of rights and obligations between recognizing and recognized states." 139)

From the above we may come to the conclusion that international personality, when it is not a full personality, but a limited personality, consists of a complex of rights and obligations, the extent of which depends upon the degree of recognition already afforded. This complex may be of a changing and expanding character as new degrees of recognition are accorded. Expansion is only complete when full de iure recognition has been given. If we apply these theories it becomes easy to explain situations such as the constitution of the older Dominions in the British Commonwealth as independent states for international law purposes. Limited degrees of international personality were gradually conceded to these entities. This limited personality continued to expand with further concessions until eventually the Dominions emerged as full international persons.¹⁴⁰⁾ In the same way it is easy to explain the expanding but always limited international personality of Southern Rhodesia in the years between 1923 and 1965.¹⁴¹⁾

The/...

139) P. 116.

140) Adopting this construction, one avoids the difficulties inherent in questions such as whether the Statute of Westminster, 22 Geo.5, Ch. 4, constituted recognition of the Dominions. See Whiteman, II, pp. 22-23; Chen, p. 86.

141) Supra, pp. 81-90, 105-119.

The above construction of the position of the "unrecognized" state is strengthened by the presumption against the inference of unilateral acts which are capable of express formulation and that against the renunciation of rights by subjects of international law.¹⁴²⁾ In the present context these presumptions would operate to give as restrictive an effect as possible to the conduct of the state calling for the observance of certain norms of international law.

It will be necessary to apply the above conclusions at a later stage when the possible existence and extent of Rhodesian personality are determined.

(1v) Rights are conceded to the unrecognized state even before recognition.

It is said, for example, that except perhaps in such fields as the extraterritorial effect to be given to certain state acts, practice with regard to unrecognized states reveals no wholesale disregard of the rights stipulated by international law for the governing of international relations.¹⁴³⁾ Thus its territorial integrity will be respected, relations may exist with it, agreements will be observed and its power to govern and determine legal relations within the territory will be respected.¹⁴⁴⁾ Further, should an unrecognized community become/...

142) Schwarzenberger, I, p. 552.

143) Briggs, p. 116.

144) Briggs, note 89) supra, p. 117.

become engaged in war, the laws of war will be followed.¹⁴⁵⁾ Likewise should such a community remain neutral in an international war, its neutrality must be respected.¹⁴⁶⁾ The fact, however, that established subjects of international law may, in individual cases, allow an unrecognized state to enjoy de facto some of the privileges of a recognized state does not mean that they concede rights in this regard to such an entity de iure. Nor does it mean that they consider themselves subject to an international law duty to the unrecognized state to act in such a way. The unrecognized state is simply left alone as a matter of courtesy, comity, lack of interest or perhaps even self-interest and not as a matter of obligation.¹⁴⁷⁾ And of course the non-recognizing state may at any time change its policy in this respect and may attempt to deny, in so far as it is able to do so, such privileges to the unrecognized state. It will not thereby incur any international responsibility to the unrecognized entity, because the latter had no rights to be infringed.

Finally/...

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- 145) Chen, p. 34 who quotes Lauterpacht, p. 54, in support of this. But it will shortly appear that Lauterpacht did not intend to assert that such relations would be legal relations.
- 146) Chen, p. 34; Brierly, "Règles Générales du Droit de la Paix" (58) (4) H.R. 1936, p. 5 at p. 54.
- 147) Lauterpacht, p. 54 says that in all probability the mutual observance of most rules of warfare between the unrecognized and its non-recognizer will naturally follow for reasons of humanity, of fear of retaliation, of military convenience, of conservation of military energy and generally for considerations similar to those for which the rules of warfare are observed in a civil war between the lawful government and rebels whom it has declared to be traitors. Lauterpacht does not say that the rules of warfare are observed because they are considered to be legally binding.

Finally it must be conceded of course that a state which is not fully recognized may have rights before full recognition. Indeed this will be the position whenever the state has obligations before full recognition.¹⁴⁸⁾ As we have seen the state will enjoy rights corresponding to its obligations.¹⁴⁹⁾ But the limited rights and obligations existing in such circumstances are in fact directly attributable to the fact that there has been an implied and limited recognition.¹⁵⁰⁾ As such the existence of rights (and obligations) before formal and full recognition is perfectly in accord with constitutive doctrine.

(v) Recognition is sometimes afforded to the internal acts of an unrecognized entity.

The internal legal system embodying the legislative, judicial and executive acts of an unrecognized entity may be afforded legal validity by the legal system of a non-recognizing state.¹⁵¹⁾ The reason asserted for this is that the regime of an unrecognized entity exists in fact, it has the power to change legal relations in the place where it exists, and that power, together with its effects, must be admitted by the courts of other states.¹⁵²⁾ There is a substantial body of precedent in which validity has been accorded to the internal acts of unrecognized entities.

Thus/...

148) For the circumstances in which the state will have such obligations, see supra, pp. 196-197.

149) Supra, p.197.

150) Supra, pp. 197-201.

151) Kuntz, note 36 supra, p. 717.

152) Borchard, note 50) supra, p.110; Marshall Brown, note 50) supra, p. 634; Briggs, note 89) supra, p.117.

Thus one finds effect given to the acts of unrecognized entities in judicial precedents from the United States,¹⁵³⁾ Italy,¹⁵⁴⁾ Germany,¹⁵⁵⁾ Switzerland,¹⁵⁶⁾ and by way of exception, the United Kingdom.¹⁵⁷⁾

There is, however, also a substantial body of precedent which would deny any effect to the internal acts of an unrecognized regime. Thus it took the United States courts over ten years to conclude that they could give effect to the internal acts of the Soviets in the absence of recognition of the Soviet Union by the United States.¹⁵⁸⁾ In the United Kingdom the general principle would appear to be to deny effect to the acts of unrecognized entities.¹⁵⁹⁾ In the Carl-Zeiss case the courts carved out an exception to this general rule.¹⁶⁰⁾

Because of the divergence of practice here it cannot be stated/...

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- 153) Salimoff v. Standard Oil Company of New York, 262 N.Y. 220 (1933); Ann. Dig. 1933-1934, Case No. 8; Wolfsohn v. R.S.F.S.R. (1922) N.Y. Supp. 282, 472; (1923) 234 N.Y. 372, 375.
- 154) Italian courts will apply the law of an unrecognized state as a general rule. See Kuntz, note 36) supra, p. 717.
- 155) Counterfeiting of Stamps (Czechoslovakia) Case (1920) Ann. Dig. 1919-1922, Case No. 24, p. 45.
- 156) In Re M. and O. (1921) Ann. Dig., 1919-1922, Case No. 42, p. 70.
- 157) Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd. [1966] 2 All. E.R. 536; In Re Al Fin Corporations Patent [1969] 3 All. E.R. 396. The latter case is interpreted by C.J F. Kidd, "Statehood and Recognition" (33) M.L.R., 1970, p. 99 at p. 101 as yet another defeat for the protagonists of the Constitutive theory.
- 158) Borchard, note 50) supra, p. 109. See too The Maret, 145 F. 2d 431; Ann. Dig. 1943-1944, Case No. 9; Gelston v. Hoyt, 3 Wheat. 246; Rose v. Himely (1808) 4 Cranch. 241.
- 159) J.G. Merrills, "Recognition and Construction" (20) I.C.L.Q., 1971, p. 476; City of Berne v. Bank of England (1804) 9 Ves. Jun. 347; Jones v. Garcia del Rio (1823) Turner and Russell, 297.
- 160) Note 157) supra. See Merrills, note 159) supra, p. 476.

stated that any international law rule has been established which would require a non-recognizing state to give effect in its own legal system to acts performed in accordance with the legal system of an unrecognized entity. Neither can it be stated that any international law rule has been established which would require the non-recognizing state to refuse to give effect to them.

In so far as a non-recognizing state, through its courts, refuses to give effect to the internal acts of an unrecognized entity, it is doing no more than international law entitles it to do. Here in effect the courts of the state are resorting to a doctrine of judicial self-limitation under which they refuse to acknowledge their competence to give effect to the acts of an entity until it is recognized. Here in effect the courts simply "shut their eyes" and follow the executive.¹⁶¹⁾

In so far as the non-recognizing state, through its courts, gives effect to the internal acts of an unrecognized entity it does so as a matter of comity, courtesy, self-interest, practical convenience or even because it must literally apply the provisions of its own legislation.¹⁶²⁾ It does not do so as a matter of international law obligation because no such obligation exists. Here the courts of the non-recognizing state are unhampered by a doctrine of judicial self-limitation.¹⁶³⁾

In/...

161) Chen, pp. 7, 89.

162) As in the Al Fin case, note 157) supra, where the court simply had to interpret whether North Korea was a state within the meaning of section 24 (1) of the Patents Act, 1949 though it was not recognized by H.M. Government.

163) Chen, p. 89 .

In effect the question whether or not validity is to be given to the internal acts of an unrecognized entity is purely a question of Private International law. The municipal law of the non-recognizing state may create rules determining precisely the circumstances in which it is prepared to give effect to the municipal law of unrecognized states. Public International law prescribes no rules or restrictions for it here. It is thus free to create municipal law rules giving effect (total or partial) to such acts or to create rules which would completely deny any effect whatsoever to the municipal law of unrecognized states. Thus it is free to adopt or reject a doctrine of judicial self-limitation and the choice here is one for its own Private International law system.¹⁶⁴⁾

We may conclude that whenever effect is given to the internal acts of an unrecognized entity, the matter is extra-legal from an international law point of view. All that happens is that the municipal law of a non-recognizing state gives effect to the municipal law of an unrecognized state.¹⁶⁵⁾ What one cannot do is to deduce that an entity is an international person with rights under international law from the mere fact that effect
is/...

164) Chen, p. 89 says that when it is unhampered by the doctrine of judicial self-limitation it applies the Declaratory theory of recognition (thus in effect supporting that theory). With respect, it is submitted that this is not so. It applies its own system of Private International law, which is of course municipal law. It does not apply public international law as such.

165) Anzilotti, note 136) supra, p. 165 says that the internal validity of acts and laws depends upon an internal norm which obliges us to apply it. This norm may be wide or narrow.

is given to its municipal law by the municipal law of another state.¹⁶⁶⁾ As Starke puts it:

"Recognition of the validity of the laws decreed or enacted by a particular entity, does not necessarily import recognition of the law-making entity."¹⁶⁷⁾

Anzilotti puts it as follows:

"Il est certain que la possibilité d'appliquer des lois, des sentences et des actes étrangers n'est pas liée à la personnalité internationale de l'ordre juridique auquel appartiennent ces lois ... jugements ... actes ..." 168)

The principal confusion in the thinking, which would infer international personality from the act of giving effect to the municipal law of the unrecognized, is caused, it is submitted, by the fact that in practice the municipal law of a state very often requires recognition (in the international law sense) of a foreign entity by the executive as a condition precedent to giving municipal law validity to the municipal law of the foreign entity in question. It is not however fully appreciated that such a requirement is accidental and in no way essential to the accord of validity. Municipal law can, and very often does, lay down criteria other than international law recognition by the executive for the purpose of extending validity to a foreign legal system. It is for each municipal law system to determine its own criteria

for/...

166) The actions of the courts of a state have no international standing. This follows from the premise that the judicial department is not the representative organ of the state in international relations. Chen, p. 239. Concessions by the courts do not therefore amount to international law recognition.

167) P. 148. He quotes the Carl-Zeiss case, note 157) supra, to support this.

168) Note 136) supra, pp. 164-165.

for the application of foreign law. The fact that different municipal law systems provide different criteria for the solution of this problem is reflected in the divergence in practice which we described above.

- (vi) Attention is drawn to the anomaly of two unrecognized states, Slovakia and Manchuko, recognizing each other and thereby, it is said, creating each other vis-à-vis each other.¹⁶⁹⁾

This criticism of constitutive doctrine is invalid, it is submitted, for two reasons.

- (A) The objection overlooks a basic facet of constitutive theory, namely that international society is a co-option society.¹⁷⁰⁾ By the device of recognition, existing full members of international society, i.e. independent states which have been recognized as such, co-opt new full international persons and other limited right-bearing entities. In the absence therefore of recognition by at least one recognized independent state, a state cannot be a full international person. It cannot therefore create international personality in another entity because it does not have the capacity to recognize. If it attempts to recognize, the "recognition" will not amount to a valid international law recognition and will not create international personality in the/...

169) See O'Connell, International Law, London, 1965, I, p.141. The argument has been given in full in the heading for the purposes of convenience and clarity. This method will also be adopted where appropriate infra.

170) Schwarzenberger, I, p. 89.

the "recognized". Whatever standards would therefore govern relations between two unrecognized states which "recognized" one another, such relations would not be governed by international law because neither had been co-opted into the international community as a full international person.

(B) The particular example quoted is not apposite because Manchukuo was recognized by Japan's allies.¹⁷¹⁾ It would therefore be competent to recognize Slovakia and create in the latter an international personality available against it, the recognizer.

(vii) Constitutive recognition makes the recognized a delegated authority derived from the will of the recognizer and this is incompatible with the equality of states.¹⁷²⁾

Even if it is true that a state obtains its international personality by virtue of the unilateral exercise of will by another state, there is no stigma of subordination once full de iure recognition is granted.¹⁷²⁾ The reason is that such recognition constitutes the recognized as a legal equal and the doctrine of the sovereign equality of states now operates between recognizer and recognized.¹⁷³⁾

(viii)/...

171) O'Connell, I, p. 144.

172) See Lauterpacht, p. 58.

173) A. Cavaglieri, Corso di Diritto Internazionale, Naples, 1934, p. 216 correctly points out that the doctrine of equality of states only applies between existing states.

(viii) If a non-sovereign state can be an international person, why cannot a sovereign but unrecognized state be an international person? 174)

It is true that one must accept this possibility if one adheres to constitutive doctrine. The non-sovereign state will have limited international personality because of limited recognition. The sovereign state will have no personality when it is totally unrecognized. The sovereign state will however have a greater inherent capacity. For it can be recognized as a full international person. On the other hand, since the non-sovereign state does not claim to be sovereign, it does not have the capacity to be recognised as a full international person.

We have now seen the various anomaly-orientated arguments against the Constitutive theory and it may be observed in conclusion that the mere fact that anomalies sometimes occur does not mean that a conceptual theory is incorrect.

(b) Policy-orientated arguments.

Here it is proposed to deal with the following arguments:

- (i) the argument based on absence of rights and duties;
- (ii) the argument that constitutive recognition is an arbitrary and unjustified weapon;
- (iii) the argument based on positivism and sovereignty.

_____ (1)/ ..

- (1) If recognition is constitutive in nature a new State can be denied rights in international law and may not be subject to duties in that system. 175)

This criticism involves two assertions. In the first place, it is argued that if a state has no duties in international law, then other states are unprotected. But the argument is not valid. As pointed out previously, other states can achieve protection by the simple expedient of recognizing the state in question. The latter will then have duties in international law to its recognizer.¹⁷⁶⁾

In the second place, it is asserted that since the unrecognized state has no rights it is placed outside the ambit of international law and is thus unprotected. Thus other states need not respect it, its territory might even be invaded and the rules of warfare might not be applied in relation to it.¹⁷⁷⁾ Certainly this is the position. It is the logical result of the consistent application of constitutive doctrine. Two observations may however be made. In practice the consequence of non-recognition will usually not be as drastic as described above as there is always the possibility of retaliation by the unrecognized.¹⁷⁸⁾ In practice there will not be a wholesale disregard of the unrecognized though in theory this is a possibility. In the second place, the above criticism is in reality directed to the inequitable,

and/ ..

175) Sorensen, p. 277; Crause, note 45) supra, p. 331.

176) Supra, p. 190.

177) Lauterpacht, p. 58.

178) Lauterpacht, pp. 52-53.

and perhaps unsatisfactory, results which the application of the Constitutive theory may sometimes produce. It is therefore a naturalistic or humanitarian argument, and as such is merely moral in character - an argument that the Constitutive theory is offensive to considerations of ethics and humanity.¹⁷⁹⁾ It cannot therefore be considered to embrace a basic or fundamental objection to the theory itself.

- (11) Since the grant of recognition is discretionary, constitutive recognition amounts to an arbitrary and unjustified weapon in the hands of existing subjects of international law.¹⁸⁰⁾

It is said that the grant of recognition is always discretionary. There is no duty to recognize.¹⁸¹⁾ As such recognition is arbitrary¹⁸²⁾ and in consequence the commencement of international personality lies outside the orbit of international law.¹⁸³⁾ This arbitrariness only becomes unjustifiable when recognition is conceived of as being constitutive.¹⁸⁴⁾

The arbitrary character of constitutive recognition then leads to undesirable results. It may be given or refused for purely political reasons. Sandars says

"... dat/...

179) Anzilotti, note 136) *supra*, pp. 163, 164; Lauterpacht, p. 52.

180) Starke, p. 144; Chen, p. 52.

181) Le Normand, pp. 52, 53, 106; Chen, p. 239. This matter is fully discussed *infra*, pp. 285-295. Both the Constitutive and Declaratory theories admit the discretionary character of recognition. See Lauterpacht, pp. 1, 63.

182) Chen, p. 46; Lauterpacht, p. 61.

183) Lauterpacht, p. 1.

184) Chen, p. 52.

"... dat erkenning self, vanweë sy politieke gekleurdheid, geen suiwere maatstaf kan wees om volkeregtelike status aan te toets nie ..." 185)

Recognition may also be withheld until it can be exchanged for benefits. 186) Guarantees and undertakings can be extracted in return for the grant of recognition. 187)

All the above is true, but the objections taken are humanitarian objections and as such they are of a merely moral character. The mere fact that the power to recognize may be abused as a matter of arbitrary policy is not a fundamental objection to the Constitutive theory. 188)

The mere fact that the theory may work hardship in isolated cases does not mean that it is incorrect.

(iii) The Constitutive theory is rooted in positivism and is an extreme assertion of sovereignty. 189)

It is said that the Constitutive theory is based on the positivistic consent theory of international law - that a state can only incur obligations which are based on its consent. 190) The consensual basis of international law is false 191) and therefore the Constitutive theory, which/...

185) Note 46) supra, p. 262. It is submitted however that recognition does provide a legally pure criterion for the commencement of international personality. It is only the political reasons which might lie in the background behind that pure criterion that are suspect.

186) Starke, p. 144. For various examples of this see Lauterpacht, pp. 33-36.

187) Conditions, terms and modalities in the form of stipulations access-oires can be arranged. See Anzilotti, note 136) supra, p. 175. These practices are strongly denounced by Lauterpacht, pp. 360-361.

188) Lauterpacht, p. 55

189) Ibid., p. 62; Chen, pp. 18-20; C H. Alexandrowicz, "New and Original States - The Issue of Reversion to Sovereignty" (45) International Affairs, 1969, p. 465 at p. 467.

190) Chen, p. 18.

191) The consent theory is attacked and criticized by Chen, pp. 19-29.

which rests upon this basis, must be incorrect. It is submitted however, that mere demonstration of the falsity of the consent theory does not show that the Constitutive theory is incorrect. It is not necessary to find a basis for the Constitutive theory in the consent theory. The Constitutive theory can exist, and apply, whether or not all rules of international law are based on the will of states. There is no reason why some at least of the rules of international law should not rest exclusively on the will of states. It is so with regard to rules emanating from treaties and unilateral declarations. Why should not this also be the position with regard to the rule for the creation of international personality by recognition (which is, in fact, a species of unilateral act)? To argue from the premise (correct, no doubt) that because all rules of international law are not based on the will of states, that some individual rules are not so based, is a non sequitur.

Thus though positivism need not, and probably does not, lie at the root of every rule of international law, it may certainly manifest itself in the case of individual rules such as those relating to the creation of personality by recognition. At this stage the argument based on positivism becomes policy-orientated. The positivistic manifestations of the rule are considered to be undesirable. The mere fact however that an individual rule is based on positivistic principles, and the fact that it is undesirable (if indeed that should be the case) does not mean that the rule does not exist.

Finally/...

Finally, the principle of sovereignty, a positivistic manifestation, even if it is not an all-embracing principle lying at the root of all international relations, still remains a fundamental principle in contemporary international law, lies at the root of many rules, and governs many relations¹⁹²⁾

(c) Practicality-orientated arguments.

Here it is proposed to deal with the following arguments

(i) the argument based on refusal by a single state only to recognize: (ii) non-recognition is not conclusive evidence of the absence of the qualifications in the non-recognized to be a state: (iii) a non-recognized state cannot be treated as a non-entity: (iv) the unrecognized state cannot be ignored; (v) the Constitutive theory may lead to an unrealistic juridical vacuum.

- (1) Mere refusal by a single state to recognize does not affect the position of a state if a great number of other states have already recognized it.¹⁹³⁾

The answer is that although the practical position of such a state is not really affected, its legal position is affected, however slightly. The state in question will enjoy international personality in its relations with all other states except the one state which refuses to recognize it. Its international personality is relative and will/...

192) Schwarzenberger, I, pp. 9-10 regards it as being one of seven fundamental principles from which all rules of international law are derived.

193) Starke, p. 144.

will only become absolute or objective when it is universally recognized.¹⁹⁴⁾ In the particular circumstances mentioned the relative international personality is so strong and so consolidated that it is unlikely that the single instance of non-recognition will present practical difficulties in international relations.

- (ii) Non-recognition is not conclusive evidence of the absence of the qualifications in the non-recognized to be a state.¹⁹⁵⁾

Certainly this is correct but as an argument against the Constitutive theory of recognition it is irrelevant. The argument fails to take into account the clear distinction which the Constitutive theory makes between the concepts of statehood and international personality. The former can exist objectively without recognition while the latter can exist only by virtue of recognition.¹⁹⁶⁾ Thus a state can certainly exist and yet not be an international person because it is unrecognized. The Constitutive theory will admit the objective existence of the unrecognized state.

- (iii) A non-recognized state cannot be treated as a non-entity.

Here reference is made to Israel and it is stated that few states would take the view that the Arab states could afford to treat Israel as a non-entity and that responsible United Nations organs and individual states have taken the view that Israel is protected, and bound, by the principles of/

194) Kelsen, note 17) supra, pp. 608-609. The idea of relative personality is discussed infra, pp. 230-233.

195) Starke, p. 144.

196) Supra, pp. 178-181.

of the United Nations Charter governing the use of force.¹⁹⁷⁾ We have here however the phenomenon of a non-recognizing and a non-recognized state becoming members of an international organization.¹⁹⁸⁾ In these circumstances there will normally be an implied but limited form of recognition present.¹⁹⁹⁾ The "non-recognizing" state is deemed to have recognized the other entity for the purposes only of membership of the organization.²⁰⁰⁾ This means that inter se the respective states will be entitled to the rights conferred by and will be subject to the duties imposed by the constituent instrument of the organization in question. Thus the position of Israel in relation to the above-mentioned Charter provisions is probably explicable on the basis of implied but limited recognition.²⁰¹⁾ If such recognition is present then legally Israel cannot be treated as a non-entity.

(iv) The unrecognized state cannot be ignored.

This is a basically similar argument to the last one. Here reference is made to the German Democratic Republic and it is stated that several states which do not recognize it have nevertheless accepted it as a party to the Nuclear/...

197) Brownlie, p. 85.

198) The recognition possibilities when this occurs are discussed supra, pp. 185-188.

199) Supra, p. 185. It is possible however that not even this limited degree of recognition need be present if the non-recognizing State makes a clear-cut reservation of rights as this will rebut any implication of limited recognition. See supra, p. 187. If this is the position pertaining between Israel and a non-recognizing Arab State, then legally the latter would be entitled to treat Israel as a non-entity but for practical reasons it would probably not do so.

200) Schwarzenberger, Manual, p. 71; Supra, pp. 185, 187-188.

201) For further discussion of the position of Israel see supra, pp. 192-195.

Nuclear Test Ban Treaty, 1963.²⁰²⁾ The position here is that an unrecognized state and non-recognizing states have become parties to a multilateral treaty.²⁰³⁾ Normally here there will be an implied recognition which is limited in that it exists only for the purposes of participation in the multilateral treaty in question.²⁰⁴⁾ Thus the rights and duties which affect East Germany under the Nuclear Test Ban Treaty, 1963 are probably attributable to implied but limited recognition. As such the limited personality of East Germany is in accordance with constitutive doctrine, and in so far as this limited personality extends, it cannot of course be legally ignored.

- (v) The Constitutive theory may lead to an unrealistic juridical vacuum. ²⁰⁵⁾

There seems to be two aspects of this argument.

- (A) There may be an international law juridical vacuum in that relations between the non-recognizer and the unrecognized state are not governed by international law. This is certainly²⁰⁶⁾ so but the argument is essentially directed against the undesirability of this and as such is a humanistic or naturalistic argument.

The/...

202) Sorensen, p. 269.

203) The recognition possibilities when this occurs are discussed supra, pp. 183-185.

204) Schwarzenberger, Manual, p. 71; supra, p. 184.

205) Sanders, note 46) supra, p. 262; Chen, pp. 37-38; P. Marshall Brown, "Effects of Recognition" (36) A.J.I.L., 1942, p. 106.

206) See discussion supra, pp. 217-217.

The mere fact that undesirable results are produced in certain cases by the operation of a rule does not mean that the rule does not exist.

As a result of this legal vacuum Chen alleges that nationals of the unrecognized state are deprived of international law protection and that nationals of the non-recognizing state who may come within the jurisdiction of the unrecognized state would find themselves in a legal no-man's land.²⁰⁷⁾ This, it is submitted, goes too far. For as Chen himself points out the present-day international community extends over all the earth's territory and is all-pervading and all-inclusive.²⁰⁸⁾ Thus if a new state is unrecognized, there must, of necessity, be an old state which is recognized and as such has title to the territory in question, can protect the inhabitants of that territory when elsewhere, and which can be responsible for what happens to aliens in the territory.²⁰⁹⁾ In any event even were international protection to be absent altogether and even were the territory a no-man's land, the argument which draws attention to these undesirable consequences of non-recognition would be merely a naturalistic or humanitarian one, a moral rather than a legal objection.

(B)/...

207) P. 38.

208) Pp. 37, 39.

209) These matters are actually discussed infra, pp. 597-619.

in the context of United Kingdom title to Rhodesian territory, the right of the United Kingdom to protect the people of Rhodesia and the responsibility of the United Kingdom for acts of the Rhodesian "rebels".

(B) There may be a municipal law juridical vacuum. Here it is said that non-recognition of a state does not and cannot suspend all intercourse between individuals across frontiers. Economic and social activities continue and these inevitably give rise to legal questions which cannot be ignored. One cannot have a legal vacuum within the borders of a state.²¹⁰⁾ We may make two observations here. In the first place, there need be no municipal law vacuum. There is no reason why the municipal law of the non-recognizing state should not give effect to the municipal law of the unrecognized state as a matter of private international law and as a matter of practical reciprocity.²¹¹⁾ Even if the municipal law of the non-recognizer refuses to give effect to the municipal law of an unrecognized new state it might still give effect to the legal system applied to the territory by the old state whom it continues to recognize. There would thus be no municipal law vacuum before the courts of other states.²¹²⁾ There is thus no necessary connection between non-recognition and a municipal/...

210) Chen, pp. 37-38.

211) See discussion of this supra, pp. 210-213.

212) Thus for instance, states which recognize United Kingdom sovereignty over Rhodesia give effect to the British version of Rhodesian municipal law in their own legal systems. This would include the Southern Rhodesia Act, 1965, the Southern Rhodesia Order-in-Council, 1965 and various other Orders made under it. It would exclude the 1965 Constitution of Rhodesia and all enactments subsequent to 11th November, 1965, in Rhodesia, all acts of Rhodesian officials and many pronouncements of the courts in Rhodesia after that date. See infra, pp. 446-453. There would thus be a legal system to apply consisting of the common law, the 1961 Constitution, applicable legislation up to 11th November, 1965, and British legislation after that date. There need not be any municipal law vacuum.

municipal law vacuum. The latter is not the invariable consequence of the former. In the second place even if there is a municipal law vacuum, the argument which draws attention to this undesirable result is again merely a moral argument and not a legal one.

(d) Historically-orientated arguments.

Here it is proposed to deal with the following two arguments:

(i) the argument dealing with the creation of the first personality; (ii) the argument based on the prerogative to recognize.

(1) It is asked how the first personality was created if personality depends on recognition. ²¹³⁾

Constitutive

Thus Chen alleges that the Constitutive theory fails to explain how the first states came into existence. ²¹⁴⁾

Liszt considers that the co-existence of a plurality of states is a necessary condition for the existence of international law and that there must be some states at least whose personalities are not derived from recognition. ²¹⁵⁾

Kelsen would answer this objection by saying that a state first recognizes itself. It then becomes a subject for itself. ²¹⁶⁾ Later it can recognize others and can in turn be recognized by them.

It is submitted however that this does not explain the difficulty satisfactorily. The idea of a state recognizing
itself/...

213) Chen, pp. 4, 39.

214) P 4.

215) See Chen, p. 39.

216) Note 17) supra, p. 609.

itself and becoming a legal subject for itself but not for others is meaningless. Legal subjectivity implies, at the very least, a bilateral relationship. A legal system demands at least two subjects. The idea of legal subjectivity existing for the subject in question alone is a contradiction in terms. Liszt is correct when he says that international law demands a plurality of states as a condition for its existence.

The answer to the particular difficulty posed is much less abstruse and lies in the history of international law itself. European states up to the nineteenth century did not require recognition for admission to the family of nations. Lawrence, referring to such European states, says that there never was a time when they were outside the pale of international law. They formed the nucleus of international society, and there was no need for them to be formally admitted to it.²¹⁷⁾ The classic writers on international law never formulated any coherent theory of recognition and there was no Constitutive theory in the pre-positivist world of the nineteenth century.²¹⁸⁾

Even before the 19th Century, African and Asian entities were admitted to the family of nations but not as full members thereof.²¹⁹⁾ In their case however recognition was required.²²⁰⁾

It/...

217) T J Lawrence, The Principles of International Law, 6th Ed., New York, 1915, p. 83; Lachs, note 58) supra, p. 253.

218) Alexandrowicz, note 189) supra, p. 467.

219) Ibid., pp. 468-471.

220) Lawrence, note 217) supra, p. 83; Lachs, note 58) supra, p. 253.

It was only from 1856 onwards that non-European states were allowed into the family of nations as full members, the first being Turkey, which was followed by Persia, China and Japan.²²¹⁾ Recognition was considered to be necessary in such cases.²²²⁾

Later the principle of recognition was extended even to new European states. Thus in 1878 the independence of Roumania, Serbia and Montenegro was recognized.²²³⁾ The World Court in Certain German Interests in Polish Upper Silesia favoured the Constitutive theory in relation to the non-recognition of Poland by Germany.²²⁴⁾

We may summarize by saying that originally recognition was not required in the case of European States but in the case of non-European states it was so required. Since the 19th Century recognition is required in the case of all new states. In other words the Constitutive theory of recognition is relatively recent in origin and thus no explanation is required for the existence of the personality of the original European members of the family of nations.

(11)/...

221) Lawrence, note 217) supra, p. 84.

222) Ibid., p. 83.

223) Ibid. p. 89. Where recognition had been accorded to European states in past centuries this was considered to be indicative of a willingness to have diplomatic, commercial and other relations with the recognized state. See Alexandrowicz, note 189) supra, p. 467.

224) Note 40) supra.

- (ii) It is asked from where the existing subjects of international law obtained their prerogative to recognize.²²⁵⁾

The answer to this criticism appears to lie in two characteristics which international society possesses.

In the first place, international society is a co-option society.²²⁶⁾ This means that new members are brought into the society by the existing members thereof. In the second place, international society is a decentralized society.²²⁷⁾

There is thus no organ in international society to perform the function of co-opting new members into the society.

The act of co-option is therefore performed by the various existing members of the society individually. The prerogative of recognition in existing members is simply the means by which this individualized process of co-option operates.

(e) Conceptually-orientated arguments.

As will shortly be seen, many of these arguments revolve around characteristics or alleged characteristics possessed by recognition. Here it is proposed to deal with the following arguments: (i) the argument based on relative existence; (ii) the argument based on the number of recognitions required to constitute personality; (iii) the argument based on the retrospective character of recognition; (iv) the argument based on the bilateral character of recognition; (v) the argument/ ..

225) Sir John Fisher Williams, "La doctrine de la reconnaissance en droit international et ses développements récents" (44) (2) H.R., 1933, p. 203 at p. 236.

226) See supra, pp. 213-214 where the co-optive nature of international society is discussed with reference to the possibility of two unrecognized states recognizing each other.

227) See infra, pp. 257-258, 274.

argument based on the unilateral character of recognition;

(vi) the argument based on implied recognition; (vii) the argument based on premature recognition; (viii) the argument based on reciprocal recognition; (ix) the argument based on the withdrawal of recognition; (x) the argument based on the status of belligerents.

- (i) If recognition is constitutive this may mean that a state exists for some states but not for other states and this is no help in deciding whether it exists objectively in law.²²⁸⁾

The answer to this would appear to be that the state does exist objectively if all the conditions of statehood are present. On the other hand the international personality of a state may be relative.²²⁹⁾ It may exist against some states but not against others. The personality of the state exists against those states which have recognized it.²³⁰⁾ Anzilotti says that the consequences of the Constitutive theory are relative personality at the same time and changing personality at different times in the same state. This corresponds exactly to the realities of international order and the phenomenon of relativity is known to municipal law too but international law²³¹⁾ carries it to a much further degree than does municipal law.

The/...

228) O'Connell, I. p. 130; Fisher Williams, note 225) supra, p. 239; the same writer, "Some Thoughts on the Doctrine of Recognition in International Law" (47) Harvard Law Review, 1933-1934, p. 776 at p.779; Crause, note 45) supra, p. 331.

229) See supra, pp. 179-181 for the distinction between statehood and international personality.

230) Kelsen, note 17) supra, p. 609.

231) Note 14) supra, p.168. An interesting example of relative personality in relations involving the allied Occupiers of Germany, West Germany and East Germany is given by Joseph W. Bishop, "The Contractual Agreements' with the Federal Republic of Germany" (49) A.J.I.L., 1955, p. 125 at p. 147.

The Constitutive theory therefore involves the possibility of relative international personality and this is in turn criticised by declaratory theorists.²³²⁾ It is said that the vital question is whether at a given time a particular state is a member of the international community and the answer to this question cannot be both "yes" and "no".²³³⁾ It is submitted however that such a state is a member of the international community and as such has rights against its recognizers though it may not have rights against other members of the international community which do not recognize it. In any event it is submitted that the vital question is not whether state X is a member of the international community or not. Instead there is a series of vital questions viz. does X bear rights against A, or B or C etc. Each of these questions can be answered either in the affirmative or in the negative.

It is also said that if we accept relativity no state can have an absolute existence.²³⁴⁾ This I interpret to mean that no state can have an objective or absolute international personality because, as we have seen, a state does exist objectively, independent of the degree of international personality which it may have. It is submitted that a state can have an absolute international personality when it has been recognized by each other existing

full/...

232) Fisher Williams, note 228 supra, p. 879.

233) Chen, p. 40.

234) Chen, p. 41 Kelsen, note 17) supra, p. 609. These ideas are based on the alleged reciprocal character of recognition which will be discussed infra, pp. 249-252.

full member of the international community. This is fortunately the position with the vast majority of states.

Again it is said that relativity leads to an undesirable and embarrassing state of confusion.²³⁵⁾ On the contrary, it is submitted that relativity leads to a greater degree of certainty. Once recognition is present one knows that legal relationships may subsist between recognized and unrecognized. If recognition is not present, one knows that the position is the opposite. Where then is the confusion?²³⁶⁾ Even if the application of constitutive doctrine did lead to confusion, arguments based on the undesirability of this state of affairs would be naturalistic.

Whether or not relativity is undesirable, and there is much to be said for the view that it is, it is an integral and necessary part of international relations in view of the decentralized nature of international society. Lauterpacht says in relation to the criticism of relativity that.

" .this is a criticism not of the constitutivist doctrine, but of the imperfection of international organization due to the fact that there is no ... authority competent to recognize ..." 237)

The position may therefore be unsatisfactory in view of the dual role of a recognizing state as an organ administering international law and as a guardian of its own interests.

This/...

235) Chen, pp 39-40; See too Sandars, note 46) supra p. 261.

236) The greater certainty afforded by constitutive doctrine is discussed infra, pp 277-278.

237) P 58

This must reveal itself in a disturbing fashion whenever there is occasion to use recognition for political advantage. The solution is to transfer the function of recognition to an international organization thus centralizing international society in this respect.²³⁸⁾ But until such centralization comes about the above defect is inherent in the existing imperfection of international organization. It is not a valid objection to the constitutive view of recognition.²³⁹⁾

- (ii) If recognition is constitutive it is asked how many states must recognize a state before it is an international person.²⁴⁰⁾

The answer to this is that recognition operates relatively and thus international personality may be relative. Recognition by one state alone will be enough to create international personality in the recognized state which is effective against its recognizer.²⁴¹⁾

(iii)/ ..

238) Lauterpacht, p. 67.

239) Ibid p. 50.

240) Brownlie, p. 84 David A. Ijalaye, "Was Biafra at any time a state in International Law" (65) A.J.I.L., 1971, p. 551 at p. 559.

241) Failure to appreciate this highly individualized relativity has sometimes led jurists to compromise solutions here. Thus Cavaglieri maintains that recognition by the majority of states including the more influential powers has the effect of creating a status valid erga omnes. But he bases his views on the silence of the remainder of the international community amounting to tacit acquiescence. See A. Cavaglieri, Corso di Diritto Internazionale, Naples, 1934, p.218. One might ask what the position would be if one of the remaining states instead of acquiescing, expressly stated its non-recognition. The theory of tacit consent is criticised by Kunz, Die Anerkennung von Staaten und Regierungen im Völkerrecht, 1928 at p.91 and K. Strupp, "Les Règles générales du droit de la Paix" (47) (1) H.R., 1934 p 263 at p. 444.

- (iii) When a new state is recognized recognition may be retrospective to the date of the actual inception of the state.²⁴²⁾

The rationale for the rule which would attribute retrospective effect to recognition is that there should be no lacuna in time during which international personality is in abeyance in respect of a particular territory.²⁴³⁾

We must now examine the institution of retrospective recognition to see whether it exists as an international law institution and if so its nature and extent. Brownlie, for example, would appear to hold the view that the institution does not exist - because retrospective recognition would be superfluous.²⁴⁴⁾ It is submitted, however, that this argument does not take the matter any further because it is based on the hypothesis that the Declaratory theory is correct.

When we examine the judicial practice of states we find that retrospective effect has been given to recognition

on/...

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- 242) Aksionairnoye Obschestvo A.M. Luther v. Sagor (James) and Co. [1921] 3 K.B. 532; Bank of Ethiopia v. National Bank of Egypt and Liguori, [1937] Ch. 513. Chen, pp. 4-5, says that the practice of states to regard recognition as retrospective can only be explained by the fact that the power in question existed prior to, and independently of, recognition. He says (p.186) that the very idea that legal effect can be given to acts of previously non-existent entities is fatal to constitutive contentions. Chen's criticism is, it is submitted not valid. The state did exist prior to recognition but its personality did not. Chen fails to appreciate the constitutivist distinction between statehood and personality. Right throughout his monograph he interprets the Constitutive theory as asserting that "existence" is created by recognition, whereas it is "personality" that is created by recognition, according to the constitutivist.
- 243) Starke, p. 145. It is submitted however that this rationale is not valid where a particular state or government is recognized and at a later stage a different state or government. Here there need be no time lag and thus no need for the rule.
- 244) Pp. 88-89.

on many occasions²⁴⁵⁾ while on other occasions it has been denied.²⁴⁶⁾ From this diversity in practice it is submitted that we may draw two conclusions.

(A) When recognition is accorded, international law does not require it to operate retrospectively to the date the state came into existence.²⁴⁷⁾

(B) States may, if they so wish, allow recognition to operate retrospectively.

They have the option of making it retrospective but they do not have to. The rule which allows retrospective recognition is therefore of a permissive character.²⁴⁸⁾ This conclusion is bolstered by the fact that recognition is in principle discretionary.²⁴⁹⁾ This being so retrospective recognition should also be discretionary.

We have just seen that recognition might or might not be retrospective. From this two questions arise: (A) When will recognition be retrospective? (B) What is the scope or extent of retrospective recognition?

(A)/...

- 245) Underhill v. Hernandez (1897) 168, U.S. 250; Oetjen v. Central Leather Co (1918) 246, U.S. 297; Dougherty v. The Equitable Life Assurance Society (1934) 266 N.Y. 71; United States v. Belmont (1937) 301, U.S. 324; Luther v. Sagor [1921] K.B. 532; White, Child and Beney Ltd. v. Simmons, 38 T.L.R. 616; The Jupiter [1927] P.122, 250; Kolbin and Sons v. William Kinnear and Co. (1930) S.C. 724; Princess Olga Paley v. Weisz [1929] 1 K.B. 718.
- 246) Guaranty Trust Company of New York v. United States (1938) 304, U.S. 126; Koninklijke Lederfabriek 'Oisterwijk' N.V. v. Chase National Bank (1941) 32 N.Y.S. 2d. 131; 263 App. Div. 815; Union of Soviet Socialist Republics v. National City Bank of New York (1941) 41 F. Supp. 353.
- 247) In the French case In re Marmalscheff, Ann. Dig., 1929-1930, Case No. 150, p. 247 it was argued that retrospective recognition was not a rule of international law. Oppenheim, I, p. 144 says there is not direct authority in international law to support retrospective recognition.
- 248) Oppenheim, I, p. 144 says that retrospective recognition is a matter of convenience rather than principle.
- 249) See discussion infra, pp. 285-295.

- (A) It is submitted that the key to the question whether recognition is retrospective in a given case is to be found in the intention of the recognizer.²⁵⁰⁾ If, therefore, the recognizer does not intend recognition to be retrospective, then recognition will not be retrospective.²⁵¹⁾ If, on the other hand, the recognizer does intend recognition to be retrospective, it will be so.²⁵²⁾

Given that the intention of the recognizer is decisive in determining the retrospectivity of recognition, there would appear to be a dispute as to whether recognition is retrospective unless there is an intention to the contrary or whether recognition is only retrospective where it is clearly intended to be so. In other words there is a dispute as to whether there is a presumption in favour of the retrospectivity of recognition or not.²⁵³⁾ Thus Raestad says that recognition is not retroactive in principle but retrospectivity is possible in certain cases.²⁵⁴⁾ Nisot on the other hand says that

retrospectivity/...

250) Kelsen, note 17) supra, p. 613.

251) Thus the British Foreign Office furnished a certificate to the court in Gdynia Ameryka Linie Zeylugowe Spolka Akcyzna v. Boguslawski [1953] A.C. 11 (H.L.) that "Up to and including midnight of July 5-6, 1945, His Majesty's Government in the United Kingdom recognized the Polish Government having its headquarters in London as being the government of Poland, and as from midnight of July 5-6, 1945, His Majesty's Government in the United Kingdom recognized the Polish Provisional Government of National Unity as the Government of Poland ..." The court inclined to the view (at 29) that this was intended to exclude any retrospective effect of the change of recognition. With respect, it is submitted, that the court was correct.

252) As in the Bank of Ethiopia case, note 242) supra, the Luther, Underhill and Oetjen cases, note 245) supra. and Williams v. Bruffy, 96 U.S. 176 at 186.

253) Writers are not agreed as to whether retroactivity is inherent in the act of recognition or not. See Chen, p. 175.

254) A. Raestad, Note 115) supra, pp. 292-293. See too Institute de Droit International, note 120) supra, Art. 7.

retrospectivity is not inherent in the act of recognition.²⁵⁵⁾ In any event, regardless of the above dispute, and regardless of whether or not there is a presumption, the presence or absence of retrospectivity ultimately depends upon the intention of the recognizer.

(B) We must now examine the possible scope of retrospective recognition. In practice it would appear that retrospective recognition is a phenomenon of limited application and is usually employed to validate certain acts of revolutionary governments performed before recognition while the deposed government was still recognized.²⁵⁶⁾ It is therefore sometimes stated that retrospective recognition is only retroactive in so far as it serves to validate the acts of the recognized entity performed within the territory in question.²⁵⁷⁾ It is submitted, however, that there is no theoretical objection to the extension of retrospective recognition beyond this limited function and indeed even generally.²⁵⁸⁾ The submission is that the scope of retrospective recognition (like the existence of such recognition itself) is governed by the intention of the recognizer. Starke summarizes the position succinctly when he says:
"...whether/...

255) See Chen, p. 176.

256) See Castel, pp. 175-176.

257) See Starke, p. 165; Guaranty Trust Co. v. United States (1938) 304 U.S. 126 at 140.

258) Starke p. 165 says that the rule limiting the effects of retrospective recognition to acts in the relevant territory is only a prima facie rule. Presumably therefore retrospective recognition may be more extensive in operation (or more restricted).

"...whether and to what extent the act of recognition is retroactive must be governed by the intention of the recognizing State, and this is logically consistent with the nature of recognition." 259)

We are now in a position to state some conclusions on the scope of recognition. Recognition has three dimensions.

- (A) A geographical dimension: It only applies as between recognizer and recognized. This dimension is inherent in the relativity of recognition.
- (B) A content dimension: Recognition may vary in content from full de iure recognition to recognition for one purpose, one right or one duty only. This dimension is inherent in the possibility of limited or partial recognition. The precise scope of recognition here depends upon the intention of the recognizer.
- (C) A time dimension:²⁶⁰⁾ Here recognition can be retrospective or not. If retrospective the degree of retrospectivity can vary in time. Intention will again be decisive in determining firstly whether recognition is retrospective and secondly, if retrospective, the scope of such retrospectivity.

Granted that recognition can be retrospective, we now have the task of harmonizing retrospective recognition with constitutive doctrine under which rights can only flow from recognition. Lauterpacht, a constitutivist himself, considers that such harmonization is impossible.²⁶¹⁾ For if a state has rights before recognition there/...

259) P. 164.

260) As Raestad, note 115) supra, p. 284 puts it:

"une reconnaissance ... limitée dans le temps."

261) Pp. 59-60. He also considers retrospective recognition to be incompatible with the Declaratory theory.

there is no need of a special doctrine. Retrospective recognition may then be conceived as an exception to the Constitutive doctrine which harmonizes municipal law - a principle of convenience - an institution based on political considerations rather than juristic logic.

It is submitted however, that retrospective recognition can be harmonized with constitutive doctrine. The fact that a recognition is retrospective does not mean that a state has rights before recognition. It does not - for recognition can have no effect until it is granted. But once granted, recognition creates an international personality and the international person has rights and duties which only arise on recognition. There is, however, no reason why the vestitive facts of such rights and duties (other than those relating to the creation of personality itself) should not consist of occurrences which pre-date recognition. Indeed this will very often be the case in practice even where recognition is not retrospective, e.g. a new state is recognized and succeeds to rights and duties under a treaty concluded with a predecessor.²⁶²⁾ The vestitive facts of such rights and duties (other than those relating to the creation of personality itself) lie in past occurrences which ante-date recognition, viz. the conclusion/...

262) See in general, O'Connell, I, pp. 373-376.

conclusion of the treaty in question. Naturally, however, the rights and duties of the successor state only arise with the establishment of the personality of this new state. There is no reason why the vestitive facts of rights and duties (other than those relating to the creation of personality itself) should not lie in past action of an entity itself performed before it was recognized. It is the function of retrospective recognition to create rights and duties arising out of such past occurrences but naturally these rights and duties can only be created simultaneously with (or later than) the creation of the personality of the entity which is to bear such rights and duties which only arise on recognition. Nisot puts this very well when he says that for the recognizing state, the recognized is, as from the moment of recognition, competent to state authoritatively the law, past and present, of the recognized state.²⁶³⁾ On this construction there is no discord between retrospective recognition and constitutive doctrine.

The institution of retrospective recognition could obviously be of very great importance to Rhodesia in the future. For if it obtained recognition in the future, that recognition might be retrospective so as to validate all the acts of the regime since 11th November, 1965 in the eyes of the recognizing state.

Finally/ ..

263) See Chen, p.176.

Finally, in relation to retrospective recognition, it is said that the courts of a new state will regard that state as having come into existence on the date when the requirements of statehood were in fact first fulfilled and not when recognition was granted by other states.²⁶⁴⁾ In the past the courts of Czechoslovakia,²⁶⁵⁾ Poland,²⁶⁶⁾ Austria,²⁶⁷⁾ Italy,²⁶⁸⁾ and the United States²⁶⁹⁾ have taken this attitude. In the case of Rhodesia the attitude has been somewhat different,²⁷⁰⁾ but in any event recognition of Rhodesia by the Rhodesian courts has antedated recognition by other states.

Even if we accept that the courts of an unrecognized state will recognize it even though it has not been accorded recognition by other states, such a situation is in no way/...

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- 264) Starke, p. 144.
- 265) Establishment of Czechoslovak State case, Ann. Dig., 1925-1926, case no. 8, p. 13; Foreign Bills Decree (Establishment of Czechoslovakia) case, Ann. Dig., 1925-1926, case no. 9, p. 14; Payment of War Tax (Czechoslovakia) case, Ann. Dig., 1919-1922, case no. 4, p. 11; Rights of Citizenship (Establishment of Czechoslovak State) case, Ann. Dig. 1919-1922, case no. 5, p. 15; Rights of Citizenship (Establishment of Czechoslovak Nationality), Ann. Dig., case no. 6, p. 17.
- 266) Republic of Poland v. Hara Jewicz, Ann. Dig., 1923-1924, case no. 1, p. 9.
- 267) A. L. B. v. Federal Ministry for the Interior, Ann. Dig., 1919-1922, case no. 7, p. 20.
- 268) Foro Italiano, vol. 46 (1921) Part. V.
- 269) McIlvaine v. Coxe's Lessee, 4 Cranch 214, 215.
- 270) The courts only accepted an independent Rhodesia in 1968 and it is doubtful if the recognition then accorded can be considered retrospective to 1965. "... the present government is *now* (italics supplied) the *de iure* government and the 1965 constitution the only valid constitution." Per Beadle, C. J., in R. v. Ndhlovu and Others, 1968 (4) S.A. 515 at 537 (R., A.D.) The recognition of government is clear from the above dictum. Recognition of the state as independent is implicit in the recognition of the 1965 Constitution as the only valid constitution since this provides that Rhodesia is independent. Constitution of Rhodesia, 1965, s. 26, 47, 143.

way fatal to constitutive doctrine. The courts of an unrecognized state have to decide whether the state exists and whether its government is lawful in accordance with their own constitutional law, i e. under municipal law. Should they decide that the state is independent and the government legitimate.²⁷¹⁾ it cannot be concluded from this that the state is also an international person. The decision simply operates on the constitutional law level and in the internal sphere. It does not operate in the sphere of international law.²⁷²⁾

- (iv) Recognition is bilateral but the state to participate in a bilateral juristic act must have pre-existing international personality

Anzilotti first developed the theory that recognition was mutually constitutive and based upon contract. According to him personality stems from an accord which is called recognition and is based on pacta sunt servanda.²⁷³⁾ We may make three comments on the general argument here.

- (A) It is extremely unlikely that recognition is a bilateral act. Such a theory finds no support in the practice of states.²⁷⁴⁾ Recognition is essentially

a/...

271) As in R. v. Ndlovu, supra note 270).

272) Even as evidence of international law, the value of such decisions is limited because there is a natural nationalistic trait here and in addition it is necessary, from a municipal law point of view, that the courts of such a state should sooner or later make such decisions. See Lauterpacht, p. 44

273) Note 14) supra, p. 161. According to Anzilotti all norms come from pacta sunt servanda, so those relating to personality should also come from this source (p.166). Accordingly a new state is free to reject recognition (p.167). Sandars, note 46) supra, p.261 prefers a bilateral act of recognition to a unilateral one.

274) Lauterpacht, p. 56.

a unilateral act²⁷⁵⁾ and the furthest one can go is to say that it is a unilateral compliance with a unilateral request.²⁷⁶⁾ If this is so the argument against the Constitutive theory based on the premise that recognition is an agreement disappears.²⁷⁷⁾

- (B) The construction of request and recognition as offer and acceptance is artificial and unnecessary.²⁷⁸⁾
- (C) Even were recognition a bilateral act, this does not necessarily suppose a pre-existing international personality. Personality could in theory commence with the performance of the bilateral act. Lauterpacht points out that even where recognition is actually provided for in a treaty, it is not difficult to regard the treaty in question as fulfilling two purposes at the same time, viz. recording the unilateral act of recognition of the new state which thereupon takes part in the contractual relationship contained in the treaty in question.²⁷⁹⁾ In this case a state actually concludes a bilateral treaty without having a pre-existing international personality.

(v) Recognition is unilateral and this is incompatible with the theory in three ways.

(A)/...

275) A. Cavaglieri, Corso di diritto internazionale, Naples, 1934, p.214; Kelsen, note 17) supra, p. 609; Schwarzenberger, I, pp. 128, 549. Raestad, note 115) supra, pp. 273-274.

276) Lauterpacht, p.56.

277) Ibid

278) Ibid., p.57.

279) Ibid., p.56.

(A) The Constitutivist theory involves relativism, and unilateral recognition is incompatible with relativism. It is said here that recognition can only function if the recognizing state is an international person in the absolute sense. In other words the unilateral investiture of personality by a state which does not have an absolute (or objective) personality can have no meaning.²⁸⁰⁾ This argument, it is submitted, is not conceptually correct. There is no reason in theory why a state with a relative international personality cannot by unilateral act extend the ambit of its relative international law relations.²⁸¹⁾

(B) The Unilateral Act theory is in conflict with positivism i.e. that a state should not be subjected to international law without its consent.²⁸²⁾ The answer to this is that it is only the state with discretion to accord recognition which cannot be brought into legal relations without its consent exhibited in recognition. Positivism only underlies this aspect of recognition. The unrecognized state is liable to be brought into legal relationships without its consent and thus, from its point of view, positivism does not underlie the operation of recognition.²⁸³⁾

(C)/...

280) Chen, pp. 41, 45

281) Supra, pp. 213-214 where the co-optive nature of international society is discussed with reference to the Slovakia-Manchuko mutual recognition.

282) Chen p. 46.

283) On positivism in relation to recognition see discussion supra, pp. 218-220.

- (C) Unilateral recognition infringes the principle of equality of states. This argument is not correct as the principle of equality of states only applies in relations between recognized states.²⁸⁴⁾

- (vi) The fact that recognition may be implied poses difficulties for the Constitutive theory.

Here it is argued as follows:

- (A) There are cases where states conclude agreements with new entities but insist that there is no recognition. This poses difficulties for the Constitutive theory because recognition can be implied from such agreements.²⁸⁵⁾ It is submitted, however, that the difficulties are illusory. Recognition need not necessarily be implied from agreement. Thus where a state insists that there is no recognition there are two possibilities. In the first place, the state intends to refuse all recognition to the entity with which it concludes the agreement. Here relations under the agreement will not be governed by international law and the position is in accordance with constitutive doctrine. In the second place, the intention might be to refuse full recognition but to accord a limited recognition for the specific purpose of bearing rights under the agreement in question/...

²⁸⁴⁾ Cavaglieri, note 275) supra. p. 216.

²⁸⁵⁾ Chen. p.193.

question. Here the treaty-making capacity of the state is recognized for one particular agreement but not for any other purpose.²⁸⁶⁾ Chen criticizes this saying:

"This would mean that there can be an intermediate situation between the total absence of personality because of non-recognition and the total enjoyment of capacity in consequence of recognition. It is not clear how such an argument can be brought into harmony with constitutive theory." ²⁸⁷⁾

With respect, it is submitted that there is no difficulty in reconciling such an "intermediate" position with constitutive doctrine. The concept of a limited and implied recognition creating a limited international personality, which we previously advocated,²⁸⁸⁾ adequately explains the position.

(B) Recognition is implied from certain acts.²⁸⁹⁾ However, the performance of these acts assumes the previous existence of the recognized entity.²⁹⁰⁾ The answer to this is that the entity may very well have existed as a state before recognition, but it was not an international person. Here again we refer to the clear distinction which we have drawn between the concepts of statehood and international personality.²⁹¹⁾

(C)/...

286) The various possibilities which may exist when an agreement is concluded between a state and another state, which it does not recognize, are discussed more fully with reference to the question of possible implied recognition of Rhodesia. Infra, pp. 354-358.

287) P. 193.

288) Supra, pp.197-201.

289) For example concluding an agreement, accrediting diplomatic representatives.

290) Chen, p. 45; Briggs, note 89) supra, p. 115.

291) Supra, pp. 178-181.

- (C) Implied recognition creates logical difficulties for the Constitutive theory. Recognition may be achieved by an act not intended by the recognizing state and thus this state might find itself burdened with international obligations without its consent.²⁹²⁾ It is submitted that this argument is based on a false premise. It asserts that implied recognition may be unintentional. It is our thesis, however, that this cannot be so because one of the essential ingredients of recognition is the intention to recognize, which is either express or implied.²⁹³⁾
- (D) Recognition might be implied from the conclusion of a signed treaty with an unrecognized entity. Afterwards the treaty might fail to secure ratification and thus might not come into operation. Would it be possible for the "recognizer" to say that since the treaty is without effect, the personality of the other must be deemed non-existent?

The answer to this is that the treaty in question may perform two functions, viz. the unilateral grant of recognition and the creation of a bilateral contractual relationship.²⁹⁴⁾ The mere fact that it fails in the latter function does not mean that the former function of bestowing recognition has not been/...

292) Chen, p.190.

293) See supra, pp. 202-203 infra, pp. 279-281.

294) Lauterpacht, p. 56.

been validly performed. The basic question then is whether or not the mere signing of the treaty implies recognition. If it does, then the personality of the other party cannot be denied. If it does not, personality in the other party can of course be denied for the simple reason that there has been no recognition.

Whether or not recognition is to be implied from the mere signing of a treaty, as yet unratified, is a matter of intention. Thus in Republic of China v. Merchants Fire Assurance Corporation of New York, the court found that a treaty, though unratified, contained a clear recognition.²⁹⁵⁾ On the other hand, it is equally possible that the intention to recognize only on ratification might be made explicit in the treaty.²⁹⁶⁾

(vii) The doctrine of premature recognition contradicts the Constitutive theory.

Under this doctrine which is fully discussed later,²⁹⁷⁾ a state may have a duty to a parent state not to recognize a breakaway state prematurely. It is argued that this doctrine contradicts the absolute creative power of recognition.²⁹⁸⁾ In relation to this doctrine there are two possibilities.²⁹⁹⁾ In the first place, premature recognition/...

295) 30 F.2d 278 (1929).

296) H.A. Smith, Great Britain and the Law of Nations, 1932, I, p.150 who cites as an example a letter from Canning to Bosanquet of 31st December, 1824 that a commercial treaty on ratification would constitute recognition.

297) Infra, pp. 295-301.

298) Chen pp 50-51.

299) These are fully discussed infra, pp. 328-333.

recognition might be void, i.e. ineffective. Here there would be no recognition of course and so no international personality would flow from it. It is submitted therefore that it is incorrect to introduce the idea of the "absolute creative power" of recognition in this context. It is beside the point if a premature recognition is no recognition at all. In the second place, a premature recognition might be valid and thus create an international personality in the recognized while at the same time constituting a tort against another subject of international law.³⁰⁰⁾ If this is the correct position, recognition is seen in its constitutive but relative role of creating international personality.

(viii) Recognition may be reciprocal in character and if so this conflicts with constitutive doctrine.

The argument here is that not only must State A recognize State B to create legal relations between them but that in addition State B must recognize State A.³⁰¹⁾ Reciprocal recognition is necessary here because otherwise State B would be burdened with obligations to State A without its consent.³⁰²⁾ The question is then posed how State B can perform the reciprocal act of recognition if it has no legal existence.³⁰³⁾

The following observations may be made on the above arguments/...

300) This is in fact the alternative preferred by the present writer. See infra, p. 333.

301) Kelsen, note 17) supra, p.609; Le Normand, p.60.

302) Chen, p.41. This is of course based on the positivistic view of the will of the state as the source of all obligations.

303) Ibid., p.43

arguments:

- (A) If we assume that reciprocal recognition is necessary, there is no reason why a previously unrecognized state cannot perform the act of reciprocal recognition. It can perform the juristic act of concluding a treaty with its recognizer which is simultaneous with, and which in fact constitutes an implied recognition of it.³⁰⁴⁾ If it can perform the bilateral juristic act of concluding a treaty though it was not an international person prior to such treaty, surely it can also perform the unilateral juristic act of reciprocal recognition? It is erroneous to assert that the state in question had no legal existence prior to its recognition. As we previously pointed out it did exist legally but was not an international person.³⁰⁵⁾ As a result it did not have rights and duties in international law but it could have the inherent capacity to exercise certain powers e.g. to assert its independence (thus making it possible for other states to recognize it) and to accord reciprocal recognition (if indeed this be necessary).³⁰⁶⁾

(B)/...

304) See infra, pp. 354-356 where the possibility of implying recognition from the conclusion of bilateral treaties is discussed.

305) See supra, pp. 197-201.

306) For the distinction between rights and duties on the one hand and powers on the other hand see W.N. Hohfeld, Fundamental Legal Conceptions (Edited W W Cook) Yale, 1963, pp. 38, 50-51 et seqq. An example from the field of Roman law will afford an analogy. A slave had no rights in Roman law. He was however, a legal entity and he had the capacity or power to bring his owner into legal relationships of a contractual nature in certain circumstances. See Leage's Roman Private Law, 3rd Ed. (Edited A.M. Prichard) London, 1961, pp. 65-66.

(B) Again even if we assume that reciprocal recognition is necessary, this simply means that two things are necessary to create international personality, namely a unilateral recognition of State B by State A, followed by another unilateral recognition of State A by State B. Whether we insist on reciprocal recognition by B or not, it is clear that at least one act of recognition will always be essential and this accords with the constitutive doctrine. Whether personality flows from one act of recognition or two such acts, it is abundantly clear that in any event it flows from recognition.

(C) In so far as the argument asserts that reciprocal recognition is a necessary corollary to constitutive doctrine, the argument may be doubted. The assertion here is based on the premise that a state would be burdened with obligations without its consent if recognition is not reciprocal. This premise in turn is based on the extreme positivistic notion that all obligations in international law flow from consent. This premise is false. As we have seen many obligations, and thus many rules of international law, are in fact based on consent. But it is untrue to say that all obligations and all rules of international law rest on a consensual basis.³⁰⁷⁾ The obligations arising from legal relationships created by an act of recognition of State B by

State A/...

³⁰⁷⁾ Supra, pp. 218-220.

State A are, it is submitted, examples of obligations being imposed on State B without its consent.³⁰⁸⁾

(D) It is in any event improbable that recognition is reciprocal. Insistence on reciprocity amounts to an assertion that a state can refuse recognition by the expedient of omitting to afford reciprocal recognition. When, however, a state first makes a claim to international personality, it lays itself open, as a necessary consequence, to being recognized by existing subjects of international law and it cannot, it is submitted, refuse to accept recognition of its claims. Insistence on reciprocal recognition would in addition run counter to the unilateral nature of recognition and the co-optive nature of international society.³⁰⁹⁾

(ix) The circumstances surrounding the withdrawal of recognition create difficulty for constitutive doctrine.

Here attention is drawn to the fact that, according to the Constitutive theory, withdrawal of recognition is not an arbitrary act of policy but an application of international law where the objective characteristics of statehood have ceased to exist.³¹⁰⁾ This, it is argued, makes withdrawal almost declaratory in nature.³¹¹⁾ We may make the following observations/...

308) Of course if we look at the obligations created for State A by its act of recognition, it is apparent that the principle of positivism does underlie the creation of such obligations. The obligations flow from the act of recognition which is a unilateral consensual act on the part of the recognizer and without this act they would not exist. This is yet another facet of the co-optive nature of international society.

309) Schwarzenberger, I, p. 89.

310) Chen, p. 260.

311) Chen, pp. 260-261.

observations on this argument:

- (A) It must be generally conceded that according to constitutive doctrine recognition cannot be withdrawn as long as the objective characteristics of statehood are present.³¹²⁾ Thus, once recognized, the personality of the state is independent of recognition, as long as it maintains the objective characteristics of statehood, i.e. as long as it continues to be a state. But when the entity ceases to have the characteristics of statehood, recognition may then be withdrawn and the entity will cease to have international personality.³¹³⁾ The point however is that withdrawal of recognition is discretionary here.³¹⁴⁾ Thus recognition need not be withdrawn and if not withdrawn the entity will continue to be an international person though it is no longer a state.³¹⁵⁾ This/...

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- 312) Kelsen, note 17) supra, p. 611 says that there is a duty not to withdraw recognition in such a case. The present writer considers however that there is not even a capacity to withdraw recognition here (at least de iure recognition) and thus that any purported withdrawal in such a case would actually be invalid and not merely a breach of duty.
- 313) Kelsen, note 17) supra, p. 611 says withdrawal is the actus contrarius of recognition and when it takes place international law no longer governs relations.
- 314) Kelsen, note 17) supra, p. 611 correctly points out that there is no duty to withdraw when the objective characteristics of statehood are lost.
- 315) O'Connell, I, p. 130 says: "Ethiopia remained a member of the League of Nations for two years after its subjugation by Italy. Continued recognition in this case kept an entity alive in law that no longer existed in fact. Perhaps we must conclude that there is a rule of law permitting a legal entity once created to survive the facts which gave it birth." So too governments-in-exile may continue to be recognized after they have lost effective control. See Sorensen, p. 289. Finally these notions are even apposite in the case of Rhodesia. For the international law claims made by the United Kingdom in respect of Rhodesia are validated by recognition on the part of other states (see infra, pp. 365-366, 592-593) though as we have seen the United Kingdom is ineffective as the Government of Rhodesia. (See supra, pp. 150-152)

This clearly distinguishes constitutive doctrine from declaratory doctrine. According to the former it is only by virtue of withdrawal that an entity loses its personality, though such withdrawal cannot take place while it remains a state. According to the latter the mere loss of the characteristics of statehood will automatically terminate personality.

- (B) The grant of constitutive recognition is discretionary but the discretion is not absolute. There is sometimes a duty not to recognize.³¹⁶⁾ If a break-away entity is obviously not a state there is a duty not to recognize it.³¹⁷⁾ If it is a state there is normally a discretion to grant or refuse recognition (thus granting or withholding personality according to constitutive doctrine). In the same way the withdrawal of recognition is discretionary but once again the discretion is not absolute for recognition must not be withdrawn as long as the state continues to exist as such.³¹⁸⁾ Once it has ceased to exist, the discretion may be exercised (here according to constitutive doctrine retaining or terminating personality in accordance with the way in which the discretion is exercised).

(C)/...

316) This is discussed infra, pp. 295-333.

317) Infra, pp. 295-296.

318) Kelsen, note 17) supra. p. 611.

- (C) According to constitutive doctrine, withdrawal of recognition (like the grant of recognition) may be an arbitrary act of policy - once the circumstances creating the discretion to withdraw have come into being.
- (D) In the last analysis, the rules relating to the withdrawal of recognition are not relevant to the question we are considering. They are concerned with the termination of international personality whereas we are here concerned with the creation of international personality, our enquiry being whether such creation can take place without recognition.
- (x) Belligerents have international personality³¹⁹⁾ and hence it is difficult to see how their status could be less after they have succeeded in their rebellion and formed an independent state which is not as yet recognized.³²⁰⁾

The answer to this argument is that if the belligerents are successful and attain their objectives by forming an independent state, they will certainly not enjoy a lesser degree of personality than they enjoyed during the struggle

They/...

319) The Constitutive theory asserts of course that recognition as belligerents is necessary to establish personality. But here again this contention is disputed by the Declaratory theory. See note 6) supra. The matter is discussed infra, pp. 562-567 in the context of the rights of military forces operating in Rhodesia. The Constitutive theory finds more support however in the context of belligerence. See for example R. Erich, "La Naissance et la Reconnaissance des Etats", 1926, H.R., III, p. 431 at pp. 460, 461 who asserts that while the recognition of States is declaratory, in the case of belligerents it is constitutive.

320) O'Connell, I, p. 130. Chen, p. 37 argues that it is unthinkable that a portion of humanity once under the protection of international law should suddenly be deprived of that protection merely because it has reorganized itself into a new state. See footnote 169) supra.

They will not lose their international personality for it is only permissible to withdraw recognition from belligerents when they lose the characteristics of their personality by being defeated.³²¹⁾ Thus successful belligerents maintain their limited international personality because, being undefeated, no withdrawal of recognition is permissible. They will only obtain full international personality when they are recognized as an independent state.

(f) Miscellaneous arguments.

Here it is proposed to deal with the following arguments:

(i) states cannot by their independent judgment establish any competence in other states which is established by international law; (ii) the argument based on the lack of centralized institutions in international society; (iii) the argument based on collective recognition; (iv) the argument based on the Charter of the Organization of American States.

(i) States cannot by their independent judgment establish any competence in other states which is established by international law. 322)

With respect, this argument begs the question. The fundamental point in dispute is - how is international personality established by international law? Does international law require recognition to establish this competence? The argument assumes however that international personality is created by international law without recognition but this is precisely the point in issue.

(ii)/...

321) Oppenheim, I p.151; Schwarzenberger, Manual, p. 77. It is sometimes asserted however that if the belligerents lose, their personality terminates automatically. See Sorensen, p.282.

322) Brownlie, p.83.

- (11) The Constitutive theory gains its plausibility from the lack of centralized institutions in international law which perform the function of recognition.

It is argued that the Constitutive theory treats this lack not as an accident due to the stage of development reached by international law, but as an essential feature of the system.³²³⁾ The answer to this is that decentralization is certainly an accident due to the development of international law but it is nevertheless an essential characteristic of present-day international law. The fact therefore is that there must be some method of determining international personality and as long as there are no centralized organs in international society capable of determining the existence of personality objectively, the determination must be made by each existing independent state individually. The device by which such a determination is made is recognition.

The position is of course unsatisfactory in that the recognizing state fulfils a dual role as an organ administering international law and as a guardian of its own interests. This must reveal itself in a disturbing fashion whenever there is occasion to use recognition as a weapon for political advantage.³²⁴⁾ There is also the unsatisfactory relativity of personality.³²⁵⁾ These defects are however inherent in the existing imperfection of/...

323) Ibid ; Sorensen. p. 268.

324) Lauterpacht, p. 67.

325) Ibid., p. 50.

of international organization. They do not constitute valid objections to the Constitutive theory.³²⁶⁾ As long as international society remains decentralized,³²⁷⁾ constitutive recognition will be an essential feature of that society. Decentralization is the rationale for the existence of constitutive recognition.

(iii) Collective recognition may be either constitutive or declaratory.

With the rise of international organizations such as the United Nations, recognition of a state may be collective in that the admission of a state to such an organization may in appropriate cases be deemed to be implied recognition by the other member states. Recognition tends to become generalized in practice.³²⁸⁾ But this collective recognition is merely a practical way of according implied recognition. It must not obscure the fact that recognition remains an essentially unilateral act, the grant of which by each state remains discretionary. Thus collective recognition is no more than a series of individual recognitions simultaneously accorded, any one of which might be individually withheld.³²⁹⁾

Let/...

326) Lauterpacht, pp. 67, 78.

327) For proposals for the centralization of recognition in accordance with a standard procedure see Philip Jessup, A Modern Law of Nations 1948, pp. 44-51. Lauterpacht, p. 67 suggests the transfer of the function of recognition to an international organization.

328) See in general Castel, p. 144. See too R. Y. Jennings, The Acquisition of Territory in International Law, Manchester, 1963, pp. 85-86 who says that collective recognition (i.e. the representation of opinion of the international community) is relevant to entitlement to territory which has been reduced into possession.

329) As for instance Arab non-recognition of Israel despite common membership of the United Nations Organization. See supra, pp. 185-187. See too, Anzilotti, note 14) supra, p. 170.

Let us now examine the contention that collective recognition is sometimes declaratory and sometimes constitutive. State X is admitted to the United Nations Organization and prior to such admission it was recognized by State A, also a member of the United Nations. Here one can argue that recognition of State X is merely declaratory of an existing personality. The point however is that such declaratory recognition is superfluous. It is in reality a second recognition which is without effect because the operative recognition was the recognition accorded in the past prior to admission.³³⁰⁾ On the other hand if State X had not been recognized by State A prior to such admission to the United Nations, the admission might be regarded as a constitutive recognition in appropriate cases.³³¹⁾

- (iv) The Charter of the Organization of American States, 1948 is a binding treaty which enshrines and confirms the Declaratory theory.

Article 6 provides that the rights of a state depend upon the mere fact of its existence. Article 9 provides that the political existence of the state is independent of recognition. Even before recognition a state enjoys certain/...

³³⁰⁾ Admission might however be construed as recognition of the fact that State X has the qualifications specified by the Charter for membership of the United Nations. (Article 4). But this is something quite different from recognition of the international personality of State X.

³³¹⁾ The recognition might not of course be a full recognition. It might be limited to the enjoyment of rights and the imposition of obligations incidental to membership of the organization as between recognized and recognizer inter se. See supra, pp.185-186. Kelsen, note 17) supra, p.614 goes so far as to say that by admission to the League a non-recognized State got the rights and duties in the Covenant against its non-recognizers even if they voted against admission. The basis of this was that competence to recognize had been transferred by members to the League organs. But the transfer was limited to the question whether states should be admitted as members.

certain rights which are specified in the article and which appear to be of a basic character.³³²⁾ Article 10 then provides that the function of recognition is essentially to bestow what we may call a full personality on the recognized state.

There would appear to be two explanations of these treaty provisions:

- (A) The provisions in question create a treaty - made exception to constitutive doctrine. Our point of departure here is the principle that by way of treaty states are free to add to, subtract from or alter, the customary law which would otherwise be applicable.³³³⁾ Such alterations will, of course, only be effective as between the parties to the treaty.³³⁴⁾ The position therefore is that even if the Constitutive theory represents international customary law, states are free to conclude treaties departing from it and entrenching the Declaratory theory as far as they themselves are concerned. The members of the Organization of American States may therefore have bound themselves to a declaratory approach, by way of exception.

But/...

332) Compare Article 3 of the Montivideo Convention on the Rights and Duties of States, 1933.

333) The exceptions would appear to be as follows: (i) states may not conclude treaties which conflict with peremptory norms of general international law as defined by Article 53 of the Vienna Convention on the Law of Treaties, 1969; (ii) Member States of the United Nations may not conclude treaties inter se which conflict with the Charter of the United Nations. See Charter, Article 103.

334) Schwarzenberger, Manual, p. 31; Wimbledon case, 1923 P.C.I.J. Ser. A. No.1. 25 at 30.

But the treaty seems to require recognition for the creation of a full international personality, if not for the creation of certain basic rights. There are however difficulties in the way of this explanation. If a political entity establishes itself as a state in any part of the world, e.g. Rhodesia, is it automatically an international person with limited and basic rights as far as member states of the Organization are concerned? If this is so then such a state would appear to derive rights from a treaty to which it is not a party, a treaty which was concluded before it existed and a treaty to which it could never become a party for the Organization of American States, being regional in character, is continental in range of membership.³³⁵⁾ This difficulty can be overcome however, if we regard the treaty in question in this respect as a stipulation pour autrui by means of which benefits are created for third parties.³³⁶⁾ If the treaty stipulates certain conditions, compliance with these is essential if the third state is to claim the benefit. Here the condition is the attainment of independent statehood. Designation ad nomen of the beneficiary is not necessary. There may even be a plurality of/...

335) Sorensen, p. 107.

336) Benefits (but not obligations) may be conferred on third states by treaties and even by unilateral acts. Sorensen, pp. 154-155, 217-219; Jiménez de Aréchaga, "Treaty Stipulations in Favour of Third States" (50) A.J.I.L., 1956, p. 338 at p. 355.

of beneficiaries determined in a general way. The beneficiaries might even be "all nations" and it is even possible for future states to derive rights from such stipulations.³³⁷⁾

- (B) It is also possible to explain the terms of the Bogatà Charter in terms of constitutive doctrine. Our starting point here is that an act of recognition may be embodied in a treaty. The act of recognition is of course a unilateral act here, though it is contained in an instrument which otherwise operates bilaterally.³³⁸⁾ This act of recognition normally operates in relation to some other party to the treaty. But seeing that the act is essentially unilateral, there is no theoretical (or practical) reason why it should not operate in relation to a non-party to the treaty and even to a non-party which is not yet in existence, if, of course, such an intention can be gleaned from the provisions of the treaty in question. On this reasoning the relevant provisions of the Bogatà Charter would be interpreted as an act of limited³³⁹⁾ and conditional recognition granted a priori by members of the Organization to such entities as might in future fulfil the requirements of independent statehood.

There/...

³³⁷⁾ Ibid., p. 356.

³³⁸⁾ See discussion supra, pp. 243, 247-248 and infra, pp. 354-355 on recognition implied from treaties.

³³⁹⁾ It is limited recognition because the provisions only concede certain basic rights to the "unrecognized" state. It follows from this that the term "recognition" when used in the context of Articles 9 and 10 must of necessity refer to full recognition. This would in any event appear to be clear from the provisions of Article 10 itself.

There is juristic controversy as to whether recognition can be conditional or not and since we have stated that recognition may be conditional, it is now necessary to refer to this controversy. Kelsen³⁴⁰⁾ is of the view that recognition cannot be conditional. Chen states that conditional recognition, i.e. recognition subject to the materialization of uncertain future events, may be regarded as simple recognition or not recognition at all. A recognition sub modo is legally possible but non-fulfillment of the modality will not affect the recognition. Many cases of so-called conditional recognition are in fact only recognition sub modo.³⁴¹⁾ Lauterpacht also considers conditional recognition to be impossible. A stipulation attempting to constitute a condition is merely a modus in the Roman law sense.³⁴²⁾

On the other hand Anzilotti argues that since recognition depends on intention one can provide conditions, modalities and stipulations accessoires.³⁴³⁾ Le Normand also considers that recognition can be conditional. He says:

"Ainsi, double liberté de l'état: 1^o de faire la déclaration de reconnaissance; 2^o de fixer les conditions auxquelles cette déclaration lui semble subordonnée." ³⁴⁴⁾

It/...

340) Note 17) supra, p.612. His view is based however on the premise that recognition establishes the legal existence of the state.

341) P 269.

342) P.362.

343) Note 14) supra, p. 175.

344) On the question of the impermissibility of withdrawing recognition see discussion of such withdrawal supra, pp. 252-255.

It would appear that a simple answer cannot be given to the question of whether or not recognition can be conditional. A distinction must be drawn between suspensive conditions and resolute conditions. It is submitted that recognition cannot be made subject to a resolute condition. The reason is that recognition, once given, cannot, as a general rule, be withdrawn.³⁴⁴⁾

A stipulation attempting to impose such a condition will operate as a modus, non-fulfilment of which will not affect recognition.³⁴⁵⁾

On the other hand, it is submitted, that recognition can be subject to a suspensive condition.³⁴⁶⁾ For

a suspensive condition does not operate to terminate personality but to withhold it. Allowing such a condition would moreover be in accordance with the completely discretionary character of the grant of recognition.³⁴⁷⁾ It would also be in accordance with the thesis that the scope of recognition is a matter of intention.

This brings us to another facet of the time-dimension of recognition. We saw previously that recognition could operate retrospectively if the recognizer so intended.³⁴⁸⁾ So too, it is submitted, that there

is/...

344) On the question of the impermissibility of withdrawing recognition see discussion of such withdrawal supra, pp. 252-255.

345) To this extent Chen and Lauterpacht are, it is submitted, correct.

346) And to this extent, it is submitted, Anzilotti and Le Normand are correct.

347) See discussion infra, pp. 285-295 on the duty to recognize.

348) Supra, pp. 236-239.

is no reason why the operation of recognition cannot be postponed until some future date or the happening of some future event if the recognizer so intends. Thus conditional recognition, like retrospective recognition, is merely an example which illustrates the fact that the scope of recognition may have a time-dimension. Conditional recognition is like retrospective recognition in that both seek to fix a date for the commencement of the operation of recognition, one in the past (retrospectively) the other in the future (prospectively). It is obvious that only a suspensive condition can so harmonize with the time-dimension of recognition, for a resolute condition does not seek a time for the commencement of recognition at all but instead a time for the termination (or withdrawal) of a recognition already accorded.

(6) Compromise approaches to the Constitutive and Declaratory theories.

Here the following arguments are advanced: (a) recognition by a mother state is constitutive but otherwise recognition is declaratory; (b) a state has some rights before recognition but only full rights on recognition; (c) where the facts are ambivalent, recognition is constitutive, but otherwise it is declaratory; (d) a state has rights before recognition but can only exercise them on recognition; (e) recognition is constitutive but there is a duty to recognize; (f) Kelsen's theory of political and legal recognition.

(a)/...

- (a) Recognition granted by a mother state when granting independence is constitutive but otherwise recognition may be declaratory.

"When a community asserts its independence it acquires capacity if it has the qualifications for statehood. When it is granted independence by the mother country it acquires capacity in virtue of this act, and not in virtue of its own subsequent assertion. In the former case recognition is subsequent to the legal fact; in the latter the recognition of independence by the mother country is constitutive of it; in neither case does the legal fact depend upon the recognition of other states."³⁴⁹⁾

These views, it is submitted, adhere to the Declaratory theory, for according to them a state can have international personality in certain cases in the absence of recognition. The Constitutive theory always asserts that personality flows from recognition. We may put this another way. According to the Declaratory theory, the investitive facts of personality may be either (i) the attributes of statehood or (ii) recognition.³⁵⁰⁾ On the other hand the Constitutive theory asserts that there is only one vestitive fact of personality, viz. recognition. The compromise approach above is obviously in accordance with the former attitude and at variance with the latter.

- (b) A state may have some rights before recognition but these will only mature into full rights and full personality when recognition is accorded.

Thus it is argued that prior to recognition a state possesses certain fundamental or universally admitted rights but as
to/ ..

³⁴⁹⁾ O'Connell, I, p. 130. .See too Raestad, note 115) supra, p.273 who states that the grant of independence constitutes recognition.

³⁵⁰⁾ See Sorensen, p. 278.

to other specific rights recognition is constitutive. This approach to the question of recognition is termed mi-constitutive or mi-declarative.³⁵¹⁾

The theory has recently been supported by Bot who advocates it as a way out of the impasse between the Constitutive and Declaratory theories and who attempts to give it substance.³⁵²⁾ Bot conceives of international law not as a system ordering relations between recognized states but as a ius inter potestates in which the unrecognized state would be accorded its own place. Basic rights and duties should be extended to it including those pertaining to the use of force. The sui juris status of an unrecognized state, in some respects inferior to its recognized counterpart, should be accepted.

It is submitted however that this compromise approach is no more than an application of the Declaratory theory for it accepts the principle that a state may have some rights (and thus at least a limited international personality) prior to, and independent of, recognition. It is completely at variance with constitutive doctrine.³⁵³⁾

- (c) Where the facts relating to the effectiveness of independence are subject to different evaluations recognition is constitutive but where there can be no controversy about statehood recognition is purely declaratory.

Once/...

351) Chen, p. 17 gives a list of the important jurists who support such an approach. It includes Cavaglieri, Miceli, Romano, Fedozzi, Savioli, Kelsen (though Kelsen later became in effect a constitutivist), Verdross, Kunz, Guggenheim. The approach was one which formerly also appealed to the present writer. See the writer's "Status of Rhodesia in International Law", Acta Juridica, 1967 at pp. 43-44. See too Briggs, p. 114.

352) Note 61) supra, p. 19.

353) See comment of Chen, p. 17.

Once again the argument outlined in (b) above is appropriate. The view expressed here is that a state can have rights independent of recognition when its statehood is beyond doubt.³⁵⁴⁾ This again is simply an application of declaratory doctrine.

A very similar approach, and one which is subject to the same criticism, is, that if a state is recognized no proof of its existence is necessary but if it is not recognized proof becomes necessary.³⁵⁵⁾

- (d) A state has rights before recognition but can only exercise them on recognition.

"... les attributions de la souveraineté ... lui (a l'état) appartiennent indépendamment de toute reconnaissance, mais c'est qu'après avoir été reconnue qu'elle en aura l'exercice assuré. Des relations politique régulières n'existent qu'entre Etats que se reconnaissent réciproquement". 356)

This theory can be criticized. It is difficult to imagine an entity possessing full legal personality and yet having its rights remain unexercisable until recognized by some other entity. Personality under such a disability would be devoid of meaning.³⁵⁷⁾

When/...

354) Sorensen, pp. 276-277.

355) Yrissarri v. Clement (1825) 2 Car. and P. 223 at 225. Other jurists put this proposition as follows. Recognition has an evidential value in that the recognizing state is henceforth bound by its declaration. See R. Erich (13) H.R., 1926, III, p. 461; H.Kelsen, Das Problem der Souveränität, 1920, p. 231.

356) Rivier, Principes des Droits des Gens, 1896, I, p.57. Other declaratists who hold similar views are Pradier-Fodéré, Fauchille, Fiore, Diena, Twiss, de Louter and Hyde. See Chen, pp. 15-16 and Lauterpacht, p. 42. The American Law Institute is of a similar view. See Restatement of the Foreign Relations Law of the United States, s. 107, 108.

357) Chen, p. 16; Whiteman, II. p. 21.

When reduced to its essentials, the view expressed above is simply an affirmation of the Declaratory theory,³⁵⁸⁾ with the addition of a qualification which is juristically unacceptable because it suggests that the obstruction of the exercise of the "rights" of an unrecognized state is legitimate. If this is indeed so, the unrecognized state surely has no rights since they need not be respected. Thus the basic premise that the unrecognized state has rights must fall to the ground.

In addition the above statement that regular political relations only exist between states which recognize one another, is, it is submitted, juridically irrelevant. Political relations can be maintained with an unrecognized entity but these will not be governed by international law.³⁵⁹⁾ Further:

"A state may refuse to enter into diplomatic relations with even a well-established State without thereby denying the latter's personality." ³⁶⁰⁾

- (e) Recognition is constitutive but there is a duty to recognize a state which meets the test of independent statehood. ³⁶¹⁾

This is in essence a compromise approach. Its merits are later discussed and the submission is made that a "duty to recognize" does not exist.³⁶²⁾

- (f) Kelsen conceives of two kinds of recognition, political and legal. ³⁶³⁾

Political recognition indicates a willingness to enter formal relations with the state recognized. Such recognition presupposes/ ..

358) Whiteman, II, p. 21.

359) Supra, pp. 181-182.

360) Whiteman, II, p. 21.

361) Lauterpacht, p. 26.

362) Infra, pp. 285-295.

363) Note 17) supra, pp. 605, 609.

presupposes the existence of the state and is therefore declaratory. It has no legal consequences.³⁶⁴⁾

Legal recognition on the other hand constitutes a subject of international law with the rights and obligations stipulated by general international law.³⁶⁵⁾

It is submitted that if political recognition has no legal effect, then it is completely superfluous and does not merit treatment as a legal concept. That leaves Kelsen with legal recognition and his views on this make him clearly a constitutivist in the traditional sense.³⁶⁶⁾ There is no compromise approach here.

(7) Arguments in favour of the Constitutive theory and against the Declaratory theory.

Here the following arguments are advanced. (a) judicial practice supports the theory; (b) the death of states supports the theory; (c) the Declaratory theory admits that sometimes recognition is constitutive; (d) the Constitutive theory is more in accord with the anomalous realities of international relations; (e) the argument based on the function of recognition; (f) the argument based on consistency; (g) the argument based on practicality.

(a)/...

³⁶⁴⁾ Ibid., p. 605.

³⁶⁵⁾ Ibid., p. 609.

³⁶⁶⁾ Chen, p. 48 says that as far as legal personality is concerned only the legal act of recognition matters. Therefore Kelsen's views have little to differentiate them from traditional views. Borchard "Recognition and Non-Recognition" (36) A.J.I.L., 1942, p.108 doubts the existence of Kelsen's distinction and whether it can have any practical significance. For further criticism see Sandars, note 46) supra, p. 261.

- (a) Judicial practice of many states does not allow the unrecognized state full and complete rights before national courts.³⁶⁷⁾

Thus, it is argued, courts may refuse to admit the validity of the acts of an unrecognized state and may apply the law of a parent state up to recognition,³⁶⁸⁾ may refuse relief if this depends on the allegation of the existence of an unrecognized state,³⁶⁹⁾ may decline the ordinary jurisdictional immunities to an unrecognized state³⁷⁰⁾ and may deny it the right to sue.³⁷¹⁾

The argument here is unconvincing. Court practice is here ambivalent. There are many instances indeed of municipal courts embracing a declaratory approach,³⁷²⁾ granting state immunity to unrecognized entities³⁷³⁾ and allowing these entities to appear as plaintiffs in proceedings before them.³⁷⁴⁾ Borchard says that the judicial attitude of courts in the United States and other countries to the Soviet Government seems to show that even before recognition, a community legally exists and must be accepted as such by foreign courts.³⁷⁵⁾ From the above it is apparent that national court practice favours neither one theory nor the other. In any event

whether/...

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- 367) Sorensen, p. 276; Starke, pp. 145, 160.
 368) Gelston v. Hoyt, 3 Wheat, 246; Rose v. Himely (1808) 4 Cranch, 241; The Nereide (1815) 9 Cranch, 388.
 369) Taylor v. Barclay (1828) 2 Sim. 213; Thompson v. Prowles (1828) 2 Sim. 194; Jones v. Garcia del Rio (1823) Turner and Russell, 297.
 370) The Annette; The Dora [1919] P.105.
 371) City of Berne v. Bank of England (1804) 9 Ves. Jun. 347.
 372) Consul of Spain v. La Concepcion (1819) 2 Wheel. Cr. Cas. 597; Yrisarri v. Clement (1826) 3 Bing 432; Doe d. Thomas v. Acklam (1824) 2 B. and C. 779 at 795; Counterfeiting of Stamps (Czeckoslovakia) Case (1920) Ann. Dig., 1919-1922, Case No. 24, p.45; Bohemian Union Bank v. Administrator of Austrian Property [1927] 2 Ch. 175; In re M. and O. (1921) Ann. Dig., 1919-1922, Case No.42, p.70.
 373) Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372. 138 N.E. 24.
 374) Guaranty Trust Co. v. U.S. (1938) 304 U.S. 126, 137.
 375) Note 366) supra, p. 110. But he points out that it took the U.S. courts ten years to adopt this attitude (p.109). Thus even U.S. court practice alone is ambivalent.

whether the courts of a state allow locus standi in judicio or state immunity to an unrecognized state or are prepared to apply the laws of the latter, is a matter which is regulated entirely by municipal law. Municipal law may adopt criteria other than recognition for the grant of such privileges. When granted such privileges operate merely in the sphere of municipal law and the courts are unhampered by a doctrine of judicial self-limitation based on recognition. There is no international law obligation on the state to grant these privileges and indeed there is no necessary connection between them and international law.³⁷⁶⁾

- (b) The death as opposed to the birth of states poses difficulties for the Declaratory theory. ³⁷⁷⁾

A state may have ceased to be such and yet it may continue to be treated as an international person. Thus Ethiopia remained a member of the League of Nations for two years after its conquest by Italy.³⁷⁸⁾ Though the allies had assumed supreme authority exercising all powers possessed by the German Government and authorities, the British Foreign Office certified that Germany still existed as a state and its nationality as a nationality.³⁷⁹⁾ The argument is that if personality depends upon the facts of statehood for its creation, it should logically follow that the cessation of such statehood should be sufficient for the dissolution of personality. O'Connell however has a plausible answer to this argument which he himself poses.

"Perhaps/...

376) See supra, pp. 208-213.

377) O'Connell, I, p. 130; Chen, p. 63.

378) O'Connell, I, p. 130.

379) R v. Bottrill, Ex parte Kuechenmeister [1946] 1 All. E.R. 635, [1947] 1 K.B. 41. For other examples see Chen, pp. 63-78.

"Perhaps we must conclude that there is a rule of law permitting a legal entity once created to survive the facts which gave it birth." 380)

In any event the general argument based on the death of states is not apposite as a criticism of the Declaratory theory because it does not deal with the creation of personality but with the termination of personality.³⁸¹⁾

- (c) According to the Declaratory theory, recognition can sometimes be constitutive.

In the case of limited international persons such as dependent states, belligerents and insurgents, international organizations and human beings, some declaratists admit that personality generally exists by virtue of recognition.³⁸²⁾ In the case of full international persons recognition can be constitutive in certain circumstances even according to the declaratory view.³⁸³⁾

It may therefore be asked why recognition should play a constitutive role in some cases and a declaratory role in others.

Declaratists, it is submitted, could readily answer this argument by pointing out that the vestitive facts of international personality can be either the objective criteria of statehood, belligerently, etc., or recognition. In the latter case recognition is of course constitutive while in the former case recognition can only be declaratory.

(d)/...

380) I, p. 130.

381) We previously saw how a similar argument could not be used either to criticise the Constitutive theory. See supra, pp. 252-255.

382) Erich, note 355) supra, pp. 360, 361.

383) Sorensen, p. 278.

- (d) The Constitutive theory accepts the anomalous realities of international relations whereas the Declaratory theory seems to pretend that these anomalies do not exist.

It is submitted that the basic reason for the divergence of view on the function of recognition is simply that the facts of effective power may very often be at variance with the recognized position. This creates an anomaly. The Declaratory theory tries to solve this anomaly. It attempts to force the legal position into line with the factual position. In so doing, it must, of necessity, minimize and even discount the role of recognition in the establishment of legal personality. On the other hand, it is submitted, that the Constitutive theory accepts the anomaly and then explains that anomaly juridically. It shows why the legal position is at variance with the facts of power and in so doing it clarifies an awkward anomaly which would otherwise be inexplicable. An approach which is at least prepared to concede the existence of the anomaly (which it cannot eschew and which in the nature of things cannot be eschewed as long as international society is decentralized) and to offer a solution, is therefore, it is submitted, preferable to an approach which tries to minimize the difficulties involved by substituting an unattainable ideal for reality.

- (e) It is difficult to explain the function of recognition if one adheres to the Declaratory theory.

Declaratists give various explanations of the function of recognition. To some recognition is merely a political declaration of willingness to have diplomatic relations

with/...

with the recognized entity.³⁸⁴⁾ To others it is merely a declaration of intention or readiness to enter into political relations.³⁸⁵⁾ Recognition is also conceived as being evidential of statehood in the recognized.³⁸⁶⁾ Recognition is also conceived as a combination of these factors. It plays a dual role in that it is a declaration of fact (that the state exists)³⁸⁷⁾ and a declaration of intention (to establish relations). In all the above roles, recognition is in fact superfluous. We may thus conclude that declaratists are manoevered into a position where they must either concede that recognition is superfluous (or at most evidentiary) or that it merely has the effect of increasing the rights which an already existing international person has,³⁸⁸⁾ or that it is a precondition for the exercise as opposed to the enjoyment of rights³⁸⁹⁾ or that it/...

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- 384) Kunz, Die Anerkennung von Staaten und Regierungen in Völkerrecht, 1928, p. 95; Verdross, Völkerrecht, 1937, pp. 114-116; Romano, Corso di diritto internazionale, 2nd ed., 1929, p. 59; Balladore Pallieri, Diritto internazionale pubblico, 1937, pp. 191, 192; Perassi, Lezioni di diritto internazionale, 1922, pp. 52-55; Scalfati Fusco, Il riconoscimento di stati nel diritto internazionale, Naples, 1938, p. 272.
- 385) Chen, p. 5; C.H. Alexandrowicz, "New and Original States - The Issue of Reversion to Sovereignty" (45) International Affairs, 1969, p. 465 at p. 467. Chen, p. 8 goes on to say that recognition de iure and de facto are indicative of the degree of the relations the recognizer intends to enter into with the recognized.
- 386) Chen, p. 6; Alexandrowicz, note 385) supra, p. 467; Herbert W. Briggs "Recognition of States: Some Reflections on Doctrine and Practice" (43) A.J.I.L., 1949, p. 113 at p. 119. Variations on this are that recognition tends to give stability to a régime and to assure its political position among nations, that it creates an estoppel against any subsequent denial of the existence of the recognized state. See Chen, pp. 6, 78; Sir John Fisher Williams, "Some Thoughts on the Doctrine of Recognition in International Law" (47) Harvard Law Review, 1933-1934, p. 776 at pp. 793-794.
- 387) Chen, p. 8.
- 388) See supra, pp. 266-267 where this proposition was discussed and rejected.
- 389) See supra, pp. 268-269 where this proposition was discussed and rejected.

it merely gives validity to a variety of acts in a foreign state.³⁹⁰⁾

It thus appears that declaratists can assign no satisfactory function to recognition. Lauterpacht says that the declaratory conception of recognition is oversimplified and devoid of usefulness,³⁹¹⁾ while O'Connell says:

"The result ... is to reduce the juridical significance of recognition and it has been argued that recognition has no other effect than to bring about ordinary diplomatic relations." ³⁹²⁾

On the other hand if one adheres to the Constitutive theory, recognition is given a specific and consistent role as the only process for the establishing of personality. Shorn of this function it would lose much, if not all, of its significance and could be dispensed with as superfluous. It is inconceivable that such a body of practice and doctrine should have developed in relation to a superfluous concept and that Schwarzenberger should recognize it as one of the seven fundamental principles of international law.³⁹³⁾

- (f) The basic assumptions of the Constitutive theory are at least consistent but not so those of the Declaratory theory.

Here it is argued that a new state, according to the Declaratory theory, cannot claim recognition but can claim what are normally regarded as the consequences of recognition - namely rights.³⁹⁴⁾

With/...

³⁹⁰⁾ Chen, p. 13. If this is all that recognition does, then it does not have any effect in international law at all but only in municipal law.

³⁹¹⁾ P.61.

³⁹²⁾ I, p. 129.

³⁹³⁾ I, pp. 15-16.

³⁹⁴⁾ Lauterpacht, p. 2.

With respect, this criticism of the Declaratory theory begs the question. It assumes the correctness of the Constitutive theory viz. that rights flow from recognition alone. But this is precisely the point in issue between the two theories.

(g) Practical considerations favour the Constitutive theory.

The Constitutive theory can furnish a higher degree of legal certainty until such time as international society becomes centralized and develops organs which have the capacity to adjudicate objectively and in a binding manner on the existence of personality in individual cases.³⁹⁵⁾ Applying the Constitutive theory one can always determine whether there is a juridical nexus between States A and B. Further one can determine precisely the extent of that juridical nexus by examining the scope of the recognition accorded.³⁹⁶⁾ Balanced however against this consideration is the disadvantage of according an arbitrary discretion to existing states but this, it is submitted, is the price which a decentralized society must pay for a measure of certainty.

By way of contrast there are grave practical difficulties and much uncertainty surrounding the application of the Declaratory theory/...

395) It has been suggested that determinations of statehood by the General Assembly of the United Nations and co-membership in the United Nations provide two methods of collective recognition by the organized community of states. See H Briggs, "Community Interest in the Emergence of New States: The Problem of Recognition", Proceedings A.S.I.L., 1950, pp. 169-181. It is probable however, that the "collective" recognition is merely a series of simultaneous individual recognitions, all of which are in any event discretionary. See supra, p. 258.

396) The writer therefore, with respect, disagrees with Sandars, note 46) supra, p. 262 when he says that "... erkenning self, vanweë sy politieke gekleurdheid, geen suiwere maatstaf kan wees om volkerregtelike status aan te toets nie ..." Recognition does provide a pure criterion. It is only the reasons which underlie the exercise of recognition that may be suspect.

theory. In the first place, the moment when a state first exists and thus becomes an international person may be incapable of solution.³⁹⁷⁾ In the second place, there may be controversy as to whether an entity is a state and thus an international person.³⁹⁸⁾ In the third place, even if the state exists, what is the extent of the rights which it enjoys before recognition? Does it enjoy all rights under international law as the American Law Institute seems to suggest?³⁹⁹⁾ Or does it enjoy certain basic rights such as those mentioned in Article 9 of the Charter of the Organization of American States?⁴⁰⁰⁾ These problems need to be solved before the Declaratory theory can attempt to provide a workable and practical solution to the problem of the existence and extent of international personality.

(8) Conclusions.

From all that we have said, we are now in a position to abstract the essential features of recognition, international personality and international society. In stating his conclusions on these matters the writer is endeavouring to offer an explanation of one of the most perplexing aspects of international law and relations by postulating, what he hopes, is a logical and self-consistent theory of recognition, which can be utilized not only to explain the problem under discussion, viz. the international status of Rhodesia, but which can also be used to afford a juristic explanation of other specific/...

397) Anzilotti, note 14) supra, p.165. Lauterpacht, p. 46 says that when the Declaratory theory asserts that a state exists from the moment it became independent, this is tautologous because this moment may be controversial.

398) Lauterpacht, p. 50 says that the Declaratory theory assumes "existence" on the part of the state but this may be the very question in issue.

399) Supra, p. 173.

400) Supra, p. 262.

specific instances drawn from the general field of international relations. The principal features of this theory are now summarized.

(a) Recognition

The essential features of recognition are as follows:

(1) Recognition is a matter of intention.

The consensual character of recognition is the most important feature of recognition⁴⁰¹⁾ and it accounts for the following characteristics.

(A) Recognition has no stipulated form.

It can be express or implied.⁴⁰²⁾ But there is no conduct, however conclusive in ordinary circumstances, the normal legal consequences of which cannot be averted by a clear manifestation of a contrary intention.⁴⁰³⁾

(B) The scope of recognition is a matter of intention.

Here recognition has various dimensions each of which depends on intention.

Geographical dimension.

Recognition only applies between recognizer and⁴⁰⁴⁾ recognized. Thus recognition is necessarily relative.

Content dimension.

Recognition may be full recognition or limited recognition. Full recognition we call de iure recognition.

Limited/...

401) Lauterpacht, pp. 371, 378; Anzilotti, note 14) supra, p. 173; supra, pp. 203, 247; Schwarzenberger, I, p. 128; Brownlie, p. 87, Whiteman, II, p. 48.

402) Anzilotti, note 14) supra, p. 170; supra, pp. 182-188, 198, 201, 245-248.

403) Lauterpacht, p. 369.

404) Supra, pp. 230-233.

Limited or partial recognition is recognition for a certain purpose or purposes only. The exact scope of limited recognition in any case is determined by intention. De facto recognition is a species of limited recognition, the content of which has crystallized. Limited recognition can be brought about by merely calling on another entity to observe certain norms of international law.⁴⁰⁵⁾

Time dimension.

Recognition normally operates from the time at which it is accorded. But it can be accorded so as to operate retrospectively. Whether it is to operate retrospectively, and if so, to what extent, is entirely a matter of intention.⁴⁰⁶⁾ Recognition may also operate from a future date. Whether or not recognition is prospective in this way, and if so, from what date, is again entirely a matter of intention. Thus it is possible for recognition to operate on the fulfilment of a suspensive condition.⁴⁰⁷⁾

(C) Recognition is discretionary.

Refusal to grant recognition is always in the absolute discretion of states. There is no duty to recognize.⁴⁰⁸⁾ The grant of recognition is generally in the discretion of states but there are two cases where this/...

405) Supra, pp. 198-206.

406) Supra, pp. 236-239.

407) Supra, pp. 263-265.

408) Infra, pp. 285-295.

this is not so and there is a duty not to recognize.⁴⁰⁹⁾

The discretionary features of recognition give it its characteristic of arbitrariness.

(ii) Recognition is a unilateral act.

It is an individual matter for each state but in form it can be collective.⁴¹⁰⁾ Here however, collective recognition is no more than a series of simultaneous individual recognitions.⁴¹¹⁾

(iii) Recognition is a diplomatic act.

Recognition is the prerogative of each existing full subject of international law. By granting recognition to new states, the existing full members extend the community.⁴¹²⁾ Furthermore, recognition is an act for the government of a state to perform. It is not the function of courts or private individuals to afford recognition on behalf of the state.⁴¹³⁾

(iv) Recognition is constitutive.

The various criticisms directed against the Constitutive theory prove on analysis to be without foundation.⁴¹⁴⁾

This feature gives recognition the characteristic of creativity. The fact that recognition creates international personality has three consequences.

(A)/...

409) Infra, pp. 295 et seqq.; 301 et seq.

410) Anzilotti, note 14) supra, p. 170.

411) Supra, p. 258.

412) Supra, p. 213.

413) Supra, pp. 210-213.

414) Lauterpacht, p. 61; Supra, pp. 177-265.

- (A) Recognition cannot, in general, be withdrawn.⁴¹⁵⁾
- (B) Recognition cannot be given subject to a resolute condition. It can however be given subject to a modus but non-fulfilment of the modality will have no effect on the recognition accorded.⁴¹⁶⁾
- (C) Kelsen's concept of political recognition is not recognition at all since it has no legal effects. His concept of legal recognition is true constitutive recognition.⁴¹⁷⁾

By treaty it may be possible to create an exception to the operation of the doctrine of constitutive recognition but even here it is possible to harmonize the treaty in question with the constitutive doctrine if one is prepared to interpret the treaty in question as effecting an act of recognition subject to a suspensive condition.⁴¹⁸⁾

- (v) Recognition normally becomes effective at the moment of unilateral communication to the addressee.⁴¹⁹⁾

(b) International personality.

The following conclusions may be expressed on this concept.

- (i) International personality and statehood are distinct concepts.

Thus an entity may have all the objective characteristics which international law prescribes for statehood. This does not make it an international person. It merely has the/...

⁴¹⁵⁾ Supra, pp. 253-255.

⁴¹⁶⁾ Supra, pp. 263, 264.

⁴¹⁷⁾ Supra, pp. 269-270.

⁴¹⁸⁾ Supra, pp. 264-265.

⁴¹⁹⁾ Schwarzenberger, I, pp. 128, 552.

the capacity to be recognized as an international person. It is only when it is accorded recognition that it will have international personality, i.e. be the bearer of rights and duties in international law.⁴²⁰⁾

(ii) International personality may be relative.

It may exist against some states but not against others. Recognition is decisive here. Personality can only be absolute (or objective) when a state is recognized by all other full international persons.⁴²¹⁾ Fortunately the vast majority of states today are in this position. But there are still the exceptions in the Koreas, Vietnams, East Germany, Israel, Bangladesh and Rhodesia. In these cases the concept of relative personality becomes important.

(iii) International personality can be changing.⁴²²⁾

Thus an entity may receive a very limited form of recognition. At a later stage a further limited degree of recognition might be bestowed and eventually full de iure recognition might be accorded. Here the international personality of the entity gradually expands as it receives further recognition until eventually it has a full international personality when it gets de iure recognition.

Anzilotti says that these characteristics, viz. relative personality at the same time, and changing personality

at/...

⁴²⁰⁾ Supra, p. 281.

⁴²¹⁾ Supra, p. 279.

⁴²²⁾ Supra, pp. 204-205.

at different times to the same state, correspond exactly to the realities of international life.⁴²³⁾

(iv) International personality may be full or limited.

(c) International society.

This comprises the sum total of international persons. It has the following characteristics:

(i) It is co-optive.

The co-optive nature of the society flows from the fact that recognition is constitutive, unilateral and diplomatic. The last-mentioned characteristic means, as we have seen, that existing full persons co-opt other right-bearing entities.

(ii) It is composed of international persons with different degrees of international personality.

This flows from the fact that personality may be relative and may be full or limited.

(iii) Its membership changes from time to time.

This will naturally occur where new recognitions are accorded and where old entities cease to exist with the result that withdrawal of recognition becomes permissible.

The various conclusions which we have expressed here will be later applied, where relevant, in the context of the status of Rhodesia.

SECTION IV/..

⁴²³⁾ Note 14) supra, p. 168.

SECTION IV

THE DUTY TO RECOGNIZE

We have stated before, but without discussion, that the grant of recognition is discretionary.¹⁾ This means that in principle recognition may be withheld for any reason, political or otherwise or perhaps for no good reason at all. The contention then is that there is no duty to recognize and this contention must now be examined. In this respect a novel theory of recognition, which can be described as a compromise between the Constitutive and Declaratory theories,²⁾ has been put forward by Judge Lauterpacht.³⁾ Generally he favours the Constitutive theory of recognition but he alleges that if a state meets the test of independent statehood, other states have a duty to recognize it.⁴⁾ Naturally if this theory reflects international law, Rhodesia is entitled to recognition. because as appears from previous discussion Rhodesia is in fact an independent state.⁵⁾ The "duty to recognize" has found some support among writers but these form a very small minority.⁶⁾ Thus Borchard alleges there is a legal right to recognition, breach of the duty to recognize is a wrong, an act of intervention and a politically hostile act./...

1) Supra, pp. 280-281.

2) Starke, pp. 145-146.

3) Lauterpacht, ch. IV, V.

4) Ibid., p. 58.

5) Supra, p. 169.

6) The duty has found some support in the works of certain Latin-American writers and in the works of members of the natural law school. See Jiménez de Aréchaga, Reconocimiento de Gobiernos, 1947. For details of other writers who support the duty see Lauterpacht pp. 64-65 who admits such writers to be in the minority.

act.⁷⁾ Quincy Wright also supports Lauterpacht's duty to recognize where the factual requirements of statehood are present.⁸⁾

Some writers seem to equivocate between supporting a duty to recognize and the principle that recognition is discretionary. Thus Raestad says that the duty to recognize exists only in extreme cases because the question whether the facts of control, upon which such an obligation is based, are present is a matter about which there could be differences of opinion in good faith.⁹⁾ This suggests that if objectively the requirements of statehood are present, a state which is subjectively and bona fide in doubt as to their existence has a discretion to recognize but otherwise it has a duty to recognize. Honoré says that although international law provides that recognition can and perhaps should be granted, the "should" is of a rather tenuous character as there are notorious examples of non-recognition over long periods of time which the international community seems to tolerate.¹⁰⁾

It is submitted that Lauterpacht's theory does not represent international law for the following reasons.

(1)/...

- 7) E. Borchard, "Recognition and Non-Recognition" (36) A.J.I.L., 1942, p. 108 at pp. 111-112. He goes on to draw the conclusion that Italy was entirely justified in withdrawing the exequatur of certain German consuls in 1860 when certain German states refused to recognize Italy. This argument, it is submitted, is not of relevance to the point. The actions of Italy in casu could not infringe international law for two reasons: (a) no state is obliged to maintain consular relations with other states; (b) Italy was incapable of wronging the German states in question because it enjoyed no operative personality vis-à-vis the German states until recognized by them. It was therefore unnecessary to attempt to justify Italian conduct as a reprisal for prior German "wrongs".
- 8) Quincy Wright, "The Chinese Recognition Problem" (49) A.J.I.L., 1955, p. 320 at p. 324.
- 9) A. Raestad, "La Reconnaissance internationale des nouveaux états et des nouveaux gouvernements" (17) Revue de Droit International et de Legislation Comparée, 1936, p. 257 at p. 276.
- 10) A.M. Honoré, "Reflections on Revolutions" (2) Irish Jurist (N.S.), 1967, p. 268 at p. 272. It would appear that Honoré regards the duty to recognize as being more of a moral or political than of a legal character.

(1) Lauterpacht's reasons for his advocacy of the duty to recognize are unconvincing. His reasons are the following:

(a) If recognition is a matter of policy or discretion, this means that the commencement of international personality is outside the orbit of international law.¹¹⁾ This is in effect the same as the argument which the declaratists make against the Constitutive theory of recognition, namely that constitutive recognition (which the declaratists admit to be discretionary) is a weapon or advantage in the hands of existing subjects of international law which may be abused.¹²⁾ The objection is policy-orientated. The mere fact that in isolated cases hardship may result from discretionary recognition is no objection.

(b) The attitude that there is no legal duty to recognize is rooted in positivism, namely the notion that the will of the state is the only source of legal obligation.¹³⁾ The argument here would appear to deny the existence of discretionary recognition because of its ancestry or progenitor, i.e. it is the embodiment of positivistic notions. But one cannot discard an existing rule merely because one disagrees with the theories which may underlie it. In addition the acceptance of one institution, namely discretionary recognition in no way implies a blind adherence to positivism in general. One can hold the view that there are certain instances in international relations/...

11) Lauterpacht, p. 1.

12) Supra, pp. 216-218.

13) Lauterpacht, p. 2. Chen, pp. 50-51 explains it thus. Denial of a duty to recognize by constitutivists is easy to understand as following the positivist principle that a state cannot permit duties to be thrust on it as a result of the emergence of a new community.

relations in which obligations can only be imposed on a state with its consent without holding the view that international obligations in general and without exception can only be imposed on a state with its consent. It is only the latter proposition that amounts to a blind adherence to positivism and while rejecting it we are free to admit that positivism still underlies certain international law institutions for this is indeed the case. One of such institutions happens to be discretionary recognition.¹⁴⁾

- (c) If recognition is a matter of policy it is divorced from the scientific bases of fact on which all law must ultimately rest.¹⁵⁾ The argument here is that the legal position should coincide with the facts of effective power. It is of course desirable for fact and law to coincide but they need not do so in every case.¹⁶⁾ Anomalous legal situations are possible and indeed such anomalies may even be in accordance with the desires of the majority of states. As the present writer previously pointed out it would be anathema to the vast majority of the community of nations if the legal position were brought into line with the effective facts of power in Rhodesia.¹⁷⁾ The community of nations therefore intend a legal anomaly in Rhodesia and they can achieve it because of the discretionary character of recognition.

(d)/...

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- 14) Another is the rule that a treaty only binds the parties to it because only their consent is present.
15) Lauterpacht, p. 5.
16) Supra, p. 274. Of course if the anomalous situations become too numerous the ultimate effectiveness of the law will be called into question but individual anomalies can and do exist without such drastic effects.
17) "Requirements of Statehood Re-Examined" (34) M.L.R., 1971, p. 410 at p.416.

- (d) Courts have described recognition as being a political and not a judicial act.¹⁸⁾ Lauterpacht interprets this to mean that the courts intended to convey that recognition is for the political organs and not the judicial organs of state. They did not mean that in performing the function the political branch is entitled to act arbitrarily and without reference to applicable legal principles.¹⁹⁾ It is submitted that this argument does not take Lauterpacht's theory any further. It merely means that it is the function of government, not the courts, to recognize, and nothing is said as to the discretionary character of governmental recognition.²⁰⁾
- (2) The preponderance of juristic opinion is firmly against the existence of any duty to recognize.²¹⁾ The majority of the writers of both the constitutive and declaratory schools of thought deny a duty to grant recognition and Lauterpacht readily admits this.²²⁾ A duty to recognize is denied by the following inter alia, Kuntz,²³⁾
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- Marshall-Brown/...
- 18) Oetjen v. Central Leather Co. (1918) 246 U.S. 297 at 302; Guaranty Trust Company of New York v. United States (1938) 304 U.S. 126 at 137.
- 19) Lauterpacht, p. 62.
- 20) It is in any event clear that the judiciary is not the representative organ of the state in international relations so that actions of the court do not ipso facto have international standing. See Chen, p. 239. Court actions may of course be of evidential value in determining the practice of a state where this is relevant to the formation of international custom. Akehurst, p. 40.
- 21) Sir John Fischer Williams, "Some Thoughts on the Doctrine of Recognition in International Law" (47) Harvard Law Review, 1933-1934, p. 776 at p. 780. But Sir John regards the position as being unsatisfactory.
- 22) P. 63. Lauterpacht in fact gives a list of these writers in footnote 1, p. 63.
- 23) J. L. Kuntz, "Critical Remarks on Lauterpacht's 'Recognition in International Law'" (44) A.J.I.L., 1950, p. 713 considers Lauterpacht's duty to recognize to be entirely untenable and quotes E. J. Cohen (64) L.Q.R., 1948 pp. 404-408, H. W. Briggs (43) A.J.I.L., 1949, pp. 113-121 and P. C. Jessup, A Modern Law of Nations, New York, 1948, p. 55 as denying the duty.

Marshall-Brown,²⁴⁾ Chen,²⁵⁾ Kelsen,²⁶⁾ Le Normand,²⁷⁾ Fischer
Williams,²⁸⁾ Fauchille,²⁹⁾ O'Connell³⁰⁾ and the American Restatement.³¹⁾

- (3) If there is a duty to recognize, it must be a positive one created by state practice alone. and it cannot be established a priori in the absence of state practice.³²⁾ When the practice of states is examined however, it would appear that a duty to recognize is at variance with such practice as Foreign Offices do not regard themselves as fulfilling a legal duty in granting recognition.³³⁾ It would appear to be clear that the practice of states treats recognition as a matter of policy³⁴⁾ and not of law and that there is thus no duty to recognize.³⁵⁾ The practice of the United States would/...

- 24) P.Marshall Brown, "The Legal Effects of Recognition" (44) A.J.I.L., 1950, p. 617 at p. 625.
25) P. 239
26) H. Kelsen, "Recognition in International Law; Theoretical Observations" (35) A.J.I.L., 1941, p. 605 at pp. 609-610 says that there is no duty but a power to recognize when the conditions for recognition are satisfied.
27) Pp. 52, 53, 55, 60. At p. 55 he says: "quand une entité politique réunit et présente tous les caractères constitutifs d'un état, elle a l'aptitude nécessaire: mais cette aptitude n'engendre pas une obligation à la charge des autres."
28) Sir John Fischer Williams, "La Doctrine de la reconnaissance en droit international et ses développements récents" (44) H.R., 1933, II, p. 203 at p. 238 says there is a political or moral duty to recognize and the time is approaching when it should be a legal duty.
29) P. Fauchille, Traité de droit international public, 8th Ed., 1922, I, p. 318.
30) O'Connell, I, pp.131-132.
31) Restatement of Foreign Relations Law of the United States, 2nd Ed. §99.
32) O'Connell, I, p. 132.
33) Herbert W. Briggs, "Recognition of states: Some Reflections on Doctrine and Practice" (63) A.J.I.L., 1949, p. 113 at p. 119.
34) Briggs, note 33 supra, p. 119 summarizes the particular considerations which states do take into account when deciding to grant recognition. These are clearly political.
35) Schwarzenberger, Manual, p. 69; Brierly, pp. 139-140; Hyde, International Law Chiefly as Interpreted and Applied by the United States, 2nd Ed., I, p. 160; G.H. Hackworth, Digest of International Law, I, p. 161; Akehurst, p. 82; O'Connell, I, p. 132; Sorensen, p. 277; Starke, p. 146.

would clearly appear to treat recognition as a matter of sovereign discretion.

"Decisions regarding recognition ... are properly within the sovereign competence of each government granting recognition, and should remain so." 36)

"Recognition ... is wholly within the discretion of the recognizing government While we may decry the fact that a government is declining to extend recognition ... I know of no rule of international law to force the hand of the government that is withholding recognition." 37)

"President Munroe ... said that it would ... be our policy 'to consider the government de facto as the legitimate government for us.' That has indeed been the general United States policy, and I believe that it is a sound general policy. However, where it does not serve our interest, we are free to vary from it." 38)

"No government has a right to have recognition. It is a privilege that is accorded, and we accord it when we think it will fit in with our national interest, and if it doesn't we don't accord it." 39)

Senator Austin speaking in the United Nations on United States recognition of Israel said:

"I should regard it as highly improper for me to admit that any country on earth can question the sovereignty of the United States ... in the exercise of that high political act of recognition." 40)

"There/...

- 36) U.S. Position on Recognition of de facto Governments, First Meeting of the Inter-American Council of Jurists, Rio de Janeiro, 1950, M.S. Department of State. See Whiteman, II, p. 5.
- 37) G.H. Hackworth, Legal Adviser, Department of State, to Secretary of State Hull, Russia v. Poland Memorandum, Jan. 29, 1944, M.S. Department of State. See Whiteman, II, p. 6.
- 38) Secretary of State Dulles, "The Threat of a Red Asia", address, New York, March, 29, 1954, XXX Bulletin, Department of State, No. 772, April 12, 1954, pp. 539, 540. See Whiteman, II, p. 6.
- 39) Secretary Dulles' news conference, Canberra, Department of State press release, No. 144, Mar. 14, 1957. See Whiteman, II, p. 7.
- 40) U.N. S.C.O.R. No. 68, 294th Meeting, May 18, 1948, p. 16. See Whiteman, II, p. 10

"There are some who say that we should accord diplomatic recognition to the Communist regime because it has now been in power so long that it has won a right to that. That is not sound international law. Diplomatic recognition is always a privilege, never a right.... One thing is established beyond a doubt. There is nothing automatic about recognition. It is never compelled by the mere lapse of time." 41)

Soviet practice would appear to be similar.

"Every state is free to enter into relations with other countries as it sees fit"...." 42)

Castel states that it is also well established in Canada that the recognition of a new state or government is a political act.⁴³⁾

The Draft Declaration on the Rights and Duties of States, drawn up by the International Law Commission in 1949, contains no statement that a state has a right to recognition and that there is a duty to recognize it.⁴⁴⁾ It is interesting to note that in observations forwarded to the United Nations in 1948 on the Draft Declaration, the British Government stated that it favoured a development of international law under which recognition would become a matter of legal duty for all states if an entity fulfilled the conditions of statehood.⁴⁵⁾ Nevertheless, despite this suggestion by the

United/...

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- 41) Secretary of State Dulles, "Our Policies toward communism in China", address before the international convention of Lions International, San Francisco, June 28, 1957, XXXVII, Bulletin, Department of State, No. 942, July 15, 1957, pp. 91, 93, 94. See Whiteman, II, p.13.
- 42) A.A.Gromyko, Soviet Minister of Foreign Affairs, speaking as chief of the Soviet Delegation at the second session, May 12, 1959, of the Geneva Meeting of Foreign Ministers, held May 11 - June 20 and July 15 - Aug. 5, 1959. Foreign Ministers Meeting, May-August, 1959, Geneva, (Department of State publication 6882) 18, 20. See Whiteman II, pp. 13-14.
- 43) J.G.Castel, International Law chiefly as Interpreted and Applied in Canada, Toronto 1965, p. 141. For an ambiguous statement on the 'duty to recognize' see Cohen, "Some International Law Problems of Interest to Canada and to Canadian Lawyers," Canadian Bar Review, 1955, p. 389 at p. 397.
- 44) For the text of the Declaration see A. Res. 375 (IV).
- 45) See Starke, p. 145; Briggs, p. 102.

United Kingdom, actual British practice would appear to be controversial.⁴⁶⁾

From the above it may fairly be concluded that the practice of states does not establish a "duty to recognize" and that the concept cannot therefore be part and parcel of international customary law. Indeed it is the absence of such a duty which explains the anomalous positions of Rhodesia, East Germany, Israel and the Government of Communist China. Divergencies in recognition practice in these cases is surely irreconcilable with a "duty to recognize".⁴⁷⁾ Indeed Kuntz points out that even Lauterpacht has to admit that he cannot find a clear statement in the practice of states in favour of a duty to recognize.⁴⁸⁾

- (4) The operation of the theory poses conceptual and juristic problems of some magnitude. Assuming that there is a duty to recognize this duty must naturally correlate to a right.⁴⁹⁾ The question therefore inevitably arises - to whom is the duty owed or in other words, in whom is the right vested? There can only be two possible solutions here.⁵⁰⁾

(a) The duty is owed to the community of states in general. Each other state therefore would have a right to demand that
entities/...

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- 46) For instances where the United Kingdom has acted inconsistently with the Lauterpacht doctrine see Akehurst, p. 82. But Akehurst considers British Governments have accepted the doctrine since the Second World War but points to the United Kingdom position in relation to East Germany as hard to reconcile with the doctrine.
- 47) See Starke, pp. 145-146.
- 48) J L.Kuntz, "Critical Remarks on Lauterpacht's 'Recognition in International Law'" (44) A.J.I.L., 1950, p. 719.
- 49) The postulation of such a duty assumes a right. See Starke, p.146; Whiteman, II, pp. 8-9; Oppenheim, International Law, 4th Ed., London, 1928, p. 144.
- 50) See Starke, p. 146; Chen, p.53.

entities bearing the characteristics of statehood should be recognized. This would in turn pose an insuperable practical difficulty where State A decided that an entity did not have the characteristics of statehood and for that reason refused to recognize it but State B considered that the entity possessed the necessary attributes, in consequence recognized it, and in addition called upon State A to recognize it.

- (b) The other possible solution is that the duty is owed to the entity possessing the necessary characteristics and that therefore this entity has a right to be recognized. This proposition is, it is submitted, juristically inconsistent. For if the entity has a "right to be recognized" this right is an international law right and the entity in question is an international person because it has that right even though it has not as yet been recognized.⁵¹⁾ Recognition in such a case would be superfluous as an instrument for the creation of personality. One might as well simply accept the Declaratory theory and discard the concept of recognition. To summarize - if the Declaratory theory is correct, the duty to recognize is superfluous, the state is already an international person. If the Constitutive theory is correct, "a duty to recognize" is completely inconsistent with the operation of the theory

because/...

51) D. Anzilotti, Cours de Droit International (Translated Gidel), Paris, 1929, I, p. 167 says: "On a dit, parfois, que l'Etat existant en fait, s'il n'est pas une personne avant la reconnaissance, a pourtant au moins un droit imparfait ... à être reconnu comme tel Mais on ne peut pas, sans une contradiction dans les termes, lier la personnalité internationale à la reconnaissance et admettre en même temps une prétention juridique à la reconnaissance: avoir une prétention signifie avoir un droit, c'est-à-dire être une personne." See too Le Normand, note 27 supra, p. 55 who says that you cannot talk of a right to recognition before an entity has a juridical existence and Chen, p. 51.

because the entity would be an international person even before it was accorded recognition seeing that it has a "right to be recognized."

The conclusion then is that in international customary law there is no duty to recognize an entity which meets the test of independent statehood.⁵²⁾ Rhodesia, therefore, cannot claim recognition as of right by other states nor have other states a duty to recognize Rhodesia.

SECTION V.

THE DUTY NOT TO RECOGNIZE.

The decision to grant recognition to a state is in general discretionary.¹⁾ Once granted, of course, recognition will have legal consequences but the initial decision to grant it is extra-legal and may be based on political considerations. There are, however, a number of exceptional cases here in which recognition seems to have moved from the sphere of policy into that of law. In these cases there may be a duty not to recognize an entity. Each of these possible duties will now be examined and applied in the Rhodesian context.

(1) There is a duty not to recognize an entity prematurely.

In particular when a new state breaks away from its mother state there/...

- 52) It is possible to create a duty to recognize by treaty. Whiteman, II, p. 7; Chen, p.51. But in this case the duty to recognize is naturally owed to the other parties to the treaty who can insist that the stipulated recognition be furnished. Ibid.
- 1) Chen, p. 416; Sir John Fisher Williams, "Some Thoughts on the Doctrine of Recognition in International Law" (47) Harvard Law Review, 1933-1934, p. 776 at p. 780; P.Marshall Brown, "The Legal Effects of Recognition" (44) A.J.I.L., 1950, p. 617 at p. 625; Akehurst, p. 79.

there is a duty not to recognize it prematurely.²⁾ The test for premature recognition is whether the outcome of the struggle between the mother state and the breakaway state is uncertain.³⁾ If not, recognition is no longer premature. Thus if the breakaway state is likely to continue as such, if there is a reasonable chance of permanence, recognition can be given. Initial success, even if apparently complete, does not make recognition permissible.⁴⁾ But when the struggle for independence has obtained a tangible measure of success accompanied by a reasonable prospect of permanency, international law authorises third states to recognize, thus in effect declaring that the sovereignty of the parent state is extinct.⁵⁾ The revolutionary struggle with the mother country must virtually have ended in favour of the breakaway state.⁶⁾

Formal renunciation of sovereignty by the mother state is not regarded as a condition for the lawfulness of recognition.⁷⁾ Thus other states may recognize a breakaway state even though the

mother/...

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- 2) Sorensen, p. 277; Akehurst, p. 80; Lauterpacht, p. 8; A.J.G.M. Sanders, "Die Erkennung van State en Regerings" (33) T.H.R.-H.R., 1970, p. 259 at p. 262. The only writer in disagreement here is D. Anzilotti, Cours de Droit International, (Tr. Gidel), Paris, 1929, I, p. 169.
 - 3) Sorensen, pp. 277-278.
 - 4) Lauterpacht, p. 10.
 - 5) Lauterpacht, p. 12. The breakaway state should have not only strength and resources for a time, but afford a promise of stability and permanence. Ibid., p. 17. See too Chen, pp. 59-60 who requires a reasonable degree of permanence and concludes correctly that recognition durante bello is premature.
 - 6) J.L.Kuntz, "Critical Remarks on Lauterpacht's 'Recognition in International Law'" (44) A.J.I.L., 1950, p. 713 at p. 716.
 - 7) Lauterpacht, p. 9. However, in the very early history of international law the position may have been different. The idea seemed to be current in the 17th century that the Netherlands and Portugal could not be recognized as full subjects of international law because Spain had not formally renounced her sovereignty over them. See Jochen A. Frowein, "Transfer or Recognition of Sovereignty - Some early problems in connection with Dependent Territories" (65) A.J.I.L., 1971, p. 568 at pp. 569-570.

mother state still maintains its claims to the breakaway territory.⁸⁾ Naturally, too, recognition by the mother state is no prerequisite for recognition by other states.⁹⁾ Naturally if the parent state itself recognizes the breakaway state, the question of premature recognition cannot conceivably arise thereafter.¹⁰⁾

The pertinent question then is whether Rhodesia is likely to continue and maintain its independence or whether the United Kingdom is likely to be successful in asserting its authority over Rhodesia. This is a factual question which the writer has previously examined.¹¹⁾ This question is essentially bound up with the doctrine of the efficacy of change.¹²⁾ The writer previously discussed this doctrine.¹³⁾ He concluded that the 1961 Constitution of Southern Rhodesia and the United Kingdom Government were ineffective in Rhodesia and that the 1965 Constitution and present Government of Rhodesia were effective.¹⁴⁾ The arguments previously preferred need/...

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- 8) The Latin American colonies of Spain declared themselves to be independent in 1810. When it became apparent that Spain, though it still maintained its claims, was not able to bring the former colonies under its sway, the United States recognized them in 1822 and the United Kingdom followed in 1824 and 1825. See the writer's "Status of Rhodesia in International Law", Acta Juridica, 1967, p.39 at p. 46.
 - 9) Lauterpacht, p. 9; Deutsche Continental Gas -Gesellschaft v. Polish State, Ann. Dig., 1929-1930, case no. 5(b), p. 14; A. Raestad, "La Reconnaissance internationale des nouveaux états et des nouveaux gouvernements" (17) Revue de Droit International et de Legislation Comparée, 1936, p. 257 at p. 274; J.E.S. Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965-1966, p. 103 at p.110 says that recognition need not be withheld as being contingent on that of the metropolitan country.
 - 10) No difficulties in recognition arise when the parent state informs third states that it has recognized the independence of the new state as was the case in the Act of Union between Denmark and Iceland, 1918. In recognizing the independence of Bulgaria in 1909 Germany expressly referred to the communication informing her that Turkey, the parent state, had recognized the new situation in Bulgaria. See Lauterpacht, p. 36. See too supra, p. 136.
 - 11) Note 8) supra, pp. 46-47; "Rhodesia: A duty not to Recognize" (33) T.H.R.-H.R., 1970, p. 152 at pp.154-155.
 - 12) H. Kelsen, General Theory of Law and State, New York, 1961, p. 219.
 - 13) Supra, pp. 148-157.
 - 14) Supra, pp. 153, 157.

need not be repeated here but the aforesaid conclusions strongly support the view that the United Kingdom is not likely to reassert its authority over Rhodesia. The following further factors may also be mentioned as being relevant to the question.

In the first place, the regime itself would appear to be reasonably secure against domestic subversion and even shows signs of vitality.¹⁵⁾ Government has been peaceful and effective with the regime firmly in control. In R. v. Ndlovu it was held that the Government was "more firmly in the saddle than ever before."¹⁶⁾

In the second place the authority of the United Kingdom would appear to be ineffective. Not only is the 1961 Constitution ineffective but the 1965 Order-in-Council,¹⁷⁾ in terms of which the United Kingdom asserts authority, would also appear to be.¹⁸⁾ Further, the United Kingdom made no provision for alternative government in the event of the 1965 Order-in-Council breaking down.¹⁹⁾ The mere assertion of plenary legal powers is irrelevant in view of the breakdown of the 1961 Constitution and the 1965 Order-in-Council.²⁰⁾

Whatever the United Kingdom Parliament determined did not affect the factual situation in which the United Kingdom remained ineffective.²¹⁾ The Order-in-Council thus remains on paper. There is no real/...

15) See here International Conciliation, September, 1970, no.579, p. 88. R. v. Ndlovu, 1968 (4) S.A. 515 (R.,A.D.) at 531.

16) 1968 (4) S.A. 515 (R.,A.D.) at 531. See too G.N. Barrie, "Die Geheime Raad en UDI" (32) T.H.R.-H.R., 1969, p. 171 at pp. 172-173; Molteno, p. 406. Factors mentioned in Ndlovu's case at 528-529 were the financial situation which was such that it could provide all necessary services, the appointment of a judge who was accepted by his colleagues, an election which returned a government candidate and the lifting of censorship.

17) Southern Rhodesia (Constitution) Order, S.I. 1952 of 1965.

18) Molteno, pp. 46, 47.

19) Molteno, p. 40.

20) Molteno, p. 46.

21) Molteno, p. 47.

real attempt to exercise governmental authority.²²⁾ Fawcett concludes that the United Kingdom assertion is a mere assertion of right²³⁾ and the Rhodesian courts have held the change to be completely efficacious.²⁴⁾ There is therefore an air of unreality when the organs of the United Nations call upon the United Kingdom as if it still had control over Rhodesia.²⁵⁾ Christie gives the following reasons for the ineffectiveness of United Kingdom legislation in Rhodesia. It had the disadvantage that it was not exercised by agreement (as it always had been before) so it had no support from the habit of obedience that ties people to familiar sources of law; it was not promulgated in Rhodesia; it had the disadvantages inherent in its own incompleteness and by ignoring its own ineffectiveness in Rhodesia, it reduced its prospects of becoming effective in the future.²⁶⁾

In the third place, the international community by means of collective sanctions organized under the auspices of the United Nations, fail to deter Rhodesia and to restore British authority.²⁷⁾ In addition the Rhodesian Appellate Division in R. v. Ndlovu examined the question of the effect of sanctions and came to the conclusion that/...

22) Molteno, p. 266.

23) J.E S Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965-1966, p. 103 at p. 112 says the position of Rhodesia in November, 1965, the failure of Britain to quell the revolution by force, in fact the renouncement of force in advance, the manifest inefficacy of the Southern Rhodesia Act, 1965 to restore legality, the inability of the United Kingdom to overthrow, or even unsettle, the Smith regime without massive international support together show that for the authority of the United Kingdom in Rhodesia there has been substituted a 'mere assertion of right'.

24) R. v. Ndlovu, 1968 (4) S.A. 515 (R., A.D) at 532.

25) International Conciliation, note 15) supra, p. 89.

26) R.H.Christie, "Practical Jurisprudence in Rhodesia" (2) C.I.L.S.A., 1969, pp.210, 211, 212.

27) International Conciliation, note 15) supra, p. 86.

that while in the long term they might cause stagnation or recession in the economy there was no reason at all to suppose that they would introduce such an economic collapse as would cause the government to capitulate.²⁸⁾

Though the sanctions campaign against Rhodesia may not force the latter to capitulate, it may nevertheless have implications in relation to the question of premature recognition.

(a) Hahlo points out that a sanctions war cannot be equated with a struggle for power within a country; that economic sanctions are normally directed against a nation - such as Italy in the Abyssinian War - and are intended to persuade a government to change its course voluntarily. They amount to an implied acknowledgment of the de facto power of the government.²⁹⁾ This in turn means that the imposition of sanctions can be interpreted as an implied acknowledgment of the efficacy of the regime in which event recognition might be granted without being stigmatised as premature.

(b) By invoking the aid of the United Nations, the United Kingdom in effect internationalised the Rhodesian situation. This could be interpreted as an inability to control a domestic issue which, it is submitted, other subjects of international law might (if they felt so inclined) take into consideration in deciding whether or not to grant recognition. We might say/...

28) 1968 (4) S A. 515 (R., A D.) at 531.

29) H.R. Hahlo, "The Privy Council and the 'Gentle Revolution'" (86) S.A L.J., 1969, p. 419 at p. 432. Hahlo uses the words "implied recognition" but as the imposition of sanctions does not amount to international law recognition, I have preferred the words "implied acknowledgment" which do not have such legal overtones.

say that the United Kingdom was here invoking "foreign aid" in the form of the cooperation of some one hundred and thirty member states of the United Nations, without which cooperation it would appear to be incompetent to assert its authority over the breakaway territory. This, it is submitted, is a factor which could very well indicate that recognition of Rhodesia would no longer be premature.³⁰⁾

The final submission based on all the foregoing arguments is that recognition of Rhodesia would no longer be premature and thus there is no duty not to recognize Rhodesia binding on other states under this particular doctrine.

(2) Treaty obligations not to recognize.

A state may undertake a duty not to recognize a situation by treaty and it will then have an international obligation to the other parties to the treaty to refrain from such recognition.³¹⁾ Treaty obligations not to recognize may be diverse in nature. An obligation not to recognize some illegal situation in international law may be imposed, thus preventing the regularising of the illegal

situation/...

30) See the writer's "Status of Rhodesia in International Law", Acta Juridica, 1967, p. 39 at p. 46 and "Rhodesia; a Duty not to Recognize" (33) T.H.R.-H.R., 1970, p. 152 at pp. 154-155.

31) Schwarzenberger, I, p. 128; Sorensen, p. 277; Lauterpacht, p.8; P. Marshall Brown, "The Legal Effects of Recognition" (44) A.J.I.L., 1950 p. 617 at p. 625; Quincy Wright, "The Chinese Recognition Problem" (49) A.J.I.L., 1955, p. 320 at p. 324.

situation by recognition.³²⁾ On the other hand there is nothing to prevent the obligation not to recognize from being aimed at the recognition of a perfectly legal situation in international law, the aim here being the prevention of the validation of that situation in international law.³³⁾ If there is a treaty duty not to recognize Rhodesia, it would appear to be of the latter variety because, as we have seen, U.D.I. and the resultant situation are not illegal in international law. If there is a treaty duty not to recognize Rhodesia, it could only arise under the Charter of the United Nations. The Charter here does not of course impose a duty not to recognize Rhodesia directly³⁴⁾ but it is possible that there may be indirect obligations under the Charter not to recognize Rhodesia. There are two possible species of such indirect obligations: (a) obligations not to recognize imposed on member states of the United Nations in terms of legally binding resolutions by organs of the latter; (b) obligations not to recognize in terms of Article 2 (5) of the Charter.

(a)/...

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- 32) Lauterpacht, p. 419. Examples here include the duty not to recognize territorial changes brought about in violation of Article 10 of the Covenant of the League of Nations and Article 2 (4) of the Charter of the United Nations; the obligation not to recognize under Article 2 of the Anti-War Treaty of Non-Aggression and Conciliation, 1953 (the Saavedra-Lamás Treaty between a number of American states including the United States) and under Article 11 of the Montevideo Convention on the Rights and Duties of States, 1933. The Stimson Doctrine of non-recognition does not however embody an obligation not to recognize. It is merely a non-binding policy statement relating to the exercise of the discretion to recognize by the United States. See Lauterpacht, pp. 417, 418, 419; Schwarzenberger, I. p. 302; O'Connell, I, p. 146; Quincy Wright, note 31) supra, p. 324.
- 33) Lauterpacht, p. 419. Examples are Article 2 of the Declaration of the Holy Alliance, 1820 at Troppau and the Central American Treaties, 1907 and 1923 which provide for non-recognition of the changes brought about by revolution. Lauterpacht, pp. 418-419; the writer, "Rhodesia; A Duty not to Recognize?" (33) T.H.R.-H.R., 1970, p.157.
- 34) O'Connell, I, p. 146 points out that the background to the Charter explains the failure of the draftsmen to incorporate specific obligations of non-recognition.

- (a) Obligations not to recognize under legally binding United Nations resolutions.

The present writer previously examined the various resolutions of the Organs of the United Nations passed before the Proclamation of the Rhodesian Republic to see whether they imposed binding legal obligations not to recognize Rhodesia.³⁵⁾

Three resolutions of the General Assembly of the United Nations dealt with the question of Rhodesian recognition.³⁶⁾ The conclusion was that none of these resolutions imposed binding legal obligations on member states of the United Nations not to recognize Rhodesia, the argument here being based on the constitutional incompetence of the General Assembly to pass binding resolutions on important political issues.³⁷⁾ Even if it had such a competence, the terminology of the resolutions amounted to no more than requests for non-recognition by member states and in any event could not even be interpreted as undertakings by those states which voted for the resolutions to bind themselves to observe the terms of the resolutions.³⁸⁾

The Security Council of the United Nations also passed three resolutions relating to the question of Rhodesian recognition

before/...

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- 35) The writer, note 33) supra, pp. 157-166. The paper in question was written before the inception of the Rhodesian Republic and the consequent decision of the Security Council on 18th March, 1970. S. Res. 277 (1970).
- 36) A.Res. 2012 (XX); A.Res. 2022 (XX); A.Res. 2379 (XXIII).
- 37) Such resolutions are recommendatory. The bulk of legal authority supports this. See here authorities cited by C.J.R. Dugard, "The Legal Effect of United Nations Resolutions on Apartheid" (83) S.A.L.J., 1966, p.44 at pp. 47,48. Sloan (25) B.Y.I.L., 1948, at p. 16 casts doubt on the orthodox view and C.J.F. Kidd, "Statehood and Recognition" (33) M.L.R., 1970, p. 99 at p. 101 states that if the British Government had recognized North Korea, this would have contravened A. Res. 195 (III). Kidd does not however go so far as to assert that Britain has a duty not to recognize North Korea under the resolution.
- 38) See the writer (33) T.H.R.-H.R., 1970, at pp. 157-159, 165 for full argument.

before the inauguration of the Rhodesian Republic.³⁹⁾ The writer concluded also that none of these resolutions imposed binding legal obligations not to recognize Rhodesian independence. In brief the reasons were as follows. The resolution of 12th November, 1965⁴⁰⁾ was a Chapter VI Resolution because Chapter VII had not been invoked⁴¹⁾ and there was no determination that there was a threat to the peace, breach of the peace or act of aggression.⁴²⁾ The resolution of 20th November, 1965⁴³⁾ was also a Chapter VI resolution because it purported to deal with a situation the continuance of which was likely to endanger the maintenance of international peace and security, which situations are provided for by Article 34 of the Charter

of/...

39) S. Res. 216 (1965); S.Res. 217 (1965); S.Res. 253 (1968).

40) S. Res. 216 (1965).

41) The International Court of Justice in its Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), I C.J. Rep. 1971 paragraph 115 held that whether a decision was made under Chapter VI or Chapter VII by the Security Council it was binding. It is submitted that the court was incorrect here. There is no authority for such a proposition which would ignore the distinction between the Chapters, an established distinction hardly open to dispute for 25 years before the court's opinion. See for instance C.J.R. Dugard, "The Simonstown Agreement: South Africa, Britain and the United Nations" (85) S.A.L.J., 1968, p. 142 at p. 148 who says that resolutions by the Security Council under Chapter VI are recommendatory and only those with a constitutional basis in Chapter VII are mandatory. Dugard, note 37) supra, p. 49 also avers that Chapter VI resolutions are generally accepted as non-binding. See too Fawcett, note 23) supra, pp. 120-121.

42) The writer, note 38) supra, pp. 159-160. It is for this reason too that John Hopkins, "International Law - Southern Rhodesia - United Nations - Security Council", Cambridge Law Journal, 1967, p. 1 at p. 2 concludes that S. Res. 216 (1965) is probably not binding. A determination as aforesaid is a condition precedent for bringing Chapter VII into operation. See Dugard, note 41) supra, p. 148 and note 37) supra, p. 49; Fawcett, note 23) supra, p. 116. See however, the view expressed by the representative of Jordan that whether the situation falls within Chapter VII is not a question of legal interpretation but is a question of evidence, proof and fact. See Chayes, II, p. 1349.

43) S. Res. 217 (1965).

of the United Nations which deals with the powers of the Security Council under Chapter VI of the Charter.⁴⁴⁾ The resolution of 29th May, 1968⁴⁵⁾ is undoubtedly a Chapter VII resolution and so it has the capacity to bind member states of the United Nations where such an intention to bind can be gleaned from the terms of the resolution.⁴⁶⁾ After an examination of such terms the writer came to the conclusion that though the matter was not free from doubt the better view would appear to be that the resolution did not impose a binding duty on members of the United Nations not to recognize Rhodesia.⁴⁷⁾

The conclusion therefore is that none of the pre-Republican resolutions of the Organs of the United Nations imposed a binding duty not to recognize Rhodesia on members of the United Nations.

The post-Republican resolutions must now be examined. On 18th March, 1970 the Security Council passed a resolution which contained the following provisions relative to the question of Rhodesian recognition.

"Reaffirming/...

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- 44) The writer, note 38 supra, at pp. 161-163. The same conclusion is expressed by Hopkins, note 42) supra, pp. 2-3 and Georges Fischer, "Le Problème Rhodesien", (11) Annuaire Francais de Droit International, 1965, p. 41 at p. 64 and for substantially similar reasons. It should be noted however that the representatives of Uruguay and Bolivia and Ambassador Goldberg on behalf of the United States expressed the peculiar view that this resolution was neither a Chapter VI nor a Chapter VII resolution. See Chayes, II, p. 1349 and John Halderman, "Some Legal Aspects of Sanctions in the Rhodesian Case" (17) I.C.L.Q., 1968, p. 672 at p. 691.
- 45) S. Res. 253 (1968).
- 46) See Advisory Opinion on South West Africa, note 41) supra §114, where the court held that the language of a Security Council Resolution should be carefully analysed to see whether it is exhortatory or mandatory. Only then can a conclusion be expressed as to its binding effect.
- 47) The writer, note 38) supra, pp. 163-165.

"Reaffirming that the present situation in Southern Rhodesia constitutes a threat to international peace and security.

Acting under Chapter VII of the United Nations Charter,

1. Condemns the illegal proclamation of republican status of the territory by the illegal regime in Southern Rhodesia;
2. Decides that Member States shall refrain from recognising this illegal regime or from rendering any assistance to it;
3. Calls upon Member States to take appropriate measures, at the national level, to ensure that any act performed by officials and institutions of the illegal regime in Southern Rhodesia shall not be accorded any recognition, official or otherwise, including judicial notice, by the competent organs of their State." 48)

The resolution under discussion is undoubtedly a Chapter VII resolution.

The Council has made the necessary preliminary finding of a threat to the peace and it has purported to act under Chapter VII. It therefore follows that this resolution is capable of imposing binding legal obligations on member states of the United Nations where, in terms, it would appear to be the intention of the

Council/...

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- 48) S. Res. 277 (1970). That a resolution of the Security Council is capable of imposing a duty not to recognize appears from the Advisory Opinion on South West Africa, note 41) supra, §133. The court however formulated this duty in a very clumsy way when it held that member states of the United Nations are under an obligation to recognize the illegality of South Africa's presence in Namibia. It is submitted that the formulation of Judge Onyeama in his separate Opinion is preferable. He said that States were obliged not to recognize South Africa's right to remain in Namibia. See (10) I.L.M., 1971, p. 746. No opinion is here expressed by the writer on the correctness of the courts' finding that there was such a duty in the case of South West Africa.

Council so to do.⁴⁹⁾ In terms of the resolution the Security Council has decided that there shall be no recognition and it has called upon member states to ensure that no act performed by Rhodesian officials shall be accorded recognition. It is submitted that this language is sufficiently mandatory and unequivocal to impose binding legal obligations on member states.⁵⁰⁾

Given then that the resolution contains binding obligations pertaining to recognition, the question now arises what is the content of such obligations? Here, in the present writer's view, the terms are somewhat imprecise. Three points of difficulty arise.

(1)/...

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- 49) See Articles 39, 41, 42, Charter of the United Nations. The only possible circumstances in which such a resolution would not enshrine binding legal obligations would be where the Security Council did not act in good faith. See W.M van der Westhuizen, "Die Bevoegdheid van die Verenigde Volke om Die Mandaat vir Suidwes-Afrika te beëindig" (31) T.H.R.-H.R., 1968, p. 330 at pp. 344-345. This is based on the rule that international organizations should act in good faith. See Schwarzenberger, Manual, p. 148. There are however, presumptions in favour of the good faith and law-abidingness of an actor. See Schwarzenberger, I, pp. 120, 647-649. In practice therefore a heavy onus would lie upon a member state of the United Nations which sought to avoid the implications of a Chapter VII resolution on the grounds that the Security Council did not act in good faith.
- 50) See John Dugard, "United Nations, Rhodesia and South Africa", Annual Survey of South African Law 1970, p. 73 who says that S.Res. 277 (1970) was properly passed under Chapter VII and that though Mr. Vorster announced that South Africa would not abide by it, in law South Africa is obliged to do so. It could perhaps be argued that in the past when the Security Council has passed binding Chapter VII resolutions on the Rhodesian situation it has specifically called upon "all states members of the United Nations to carry out these decisions ... in accordance with Article 25 ... and reminds them that failure or refusal by any of them to do so would constitute a violation of that article". See S. Res 232 (1966) and S. Res. 253 (1968). In the present resolution however there is no warning to states that failure to observe the terms of the resolution in question will constitute a violation of their Charter obligations and therefore by implication the Security Council did not intend its decisions to be binding. It is submitted however that this omission as an indication of intention must give way to the mandatory language contained in §§ 2 and 3 when used in conjunction with a specific invocation of Chapter VII.

- (i) Does the resolution prohibit recognition of the State of Rhodesia?
- (ii) If the resolution prohibits recognition of the State of Rhodesia, does it prohibit not only full, i.e. de iure recognition, but also more limited forms of recognition such as de facto recognition?
- (iii) If the resolution prohibits recognition of the State of Rhodesia, is this a general prohibition of recognition of the state in whatever form it may take or alternatively does the resolution only prohibit recognition of the State of Rhodesia in Republican form - thus for example leaving states free to recognize the status quo ante the proclamation of a republic, i.e. to afford recognition to the State of Rhodesia as an independent monarchy with Queen Elizabeth II as Head of State?
- (i) At first sight it might appear that the prohibition of recognition here refers only to recognition of Government. Member states are told to refrain from recognizing the "illegal régime". These words primarily indicate a form of government.⁵¹⁾ It is submitted however that the prohibition intended by the Security Council here includes a prohibition on the recognition of the State of Rhodesia. The Security Council is using the expression "illegal régime" in a rather loose fashion, as it has done in several previous resolutions.⁵²⁾ The following factor indicates/...

51) The Shorter Oxford English Dictionary, 3rd ed., 1958.

52) See S. Res. 216 (1965). In S. Res. 217 (1965) reference is made to the "illegal authority".

indicates that the Security Council intended this rather loose expression to apply to the State of Rhodesia as well as to the Government of Rhodesia. Paragraph 12 of the Resolution in question

"Calls upon Member States to take appropriate action to suspend any membership or associate membership that the illegal régime of Southern Rhodesia has in specialized agencies of the United Nations."

Only states (independent or dependent) can be members of such international organizations as the specialized agencies of the United Nations. Clearly, therefore, the Security Council here was asking for the termination of the membership of the State of Rhodesia even though it uses the word "régime". Precisely the same arguments apply in respect of paragraph 13 of the same resolution which reads that the Security Council

"Urges Member States of any international or regional organizations to suspend the membership of the illegal régime of Southern Rhodesia from their respective organizations and to refuse any request for membership from that régime."

Clearly therefore the Security Council has used the term "illegal régime" to denote the State of Rhodesia in these two paragraphs. By implication the use of a precisely similar term in paragraph 2 aforesaid has the same meaning.

On the other hand the following factors are some indication that the term "régime" is meant to apply to the Government of Rhodesia only (and not to both State and Government)

(A)/...

(A) Paragraph 3 of the resolution in question is only explicable on the basis that the Government of Rhodesia should not be recognized. For if the Government of Rhodesia were to be recognized, the acts referred to in paragraph 3 might be recognized at the national level in other states. Paragraph 3 therefore contemplates the position where a government is unrecognized by another state but the municipal law of that other state will nevertheless give some effect at the national level to acts performed by officials of the unrecognized régime (as a matter of comity and without of course conceding any international obligation to give such effect). The paragraph therefore, it is submitted, is directed merely against the extension of such comity to the acts of the unrecognized régime.⁵³⁾ Even though paragraph 3 is therefore only explicable on the basis that the Government of Rhodesia should not be recognized, this is however in no way conclusive that the "illegal régime" in paragraph 2 is intended to refer only to the Government of Rhodesia for there is no reason why the combined effect of paragraphs 2 and 3 together should not be to prohibit:

1. recognition of the State of Rhodesia
2. recognition of the Government
3. extension of comity to the acts of officials of an unrecognized Rhodesian Government.

Thus/...

53) The full implications of the paragraph will be discussed later in connection with the position of the Rhodesian Government and the Rhodesian legal system. See infra, pp. 443-465.

Thus paragraph 3 is compatible with a duty not to recognize the State of Rhodesia.

- (B) Paragraph 1 of the resolution draws a distinction between the "status of the territory" and the "illegal régime". By the former expression the Security Council may have been referring to the State of Rhodesia whilst the latter expression in the context of the particular paragraph obviously indicates the government of the territory. Since "illegal régime" obviously indicates the government in paragraph 1 it would not be unreasonable to ascribe a similar meaning to the term in the following paragraph 2.

Previous use of the expression "illegal régime" by United Nations organs in the Rhodesian context is equivocal and does not furnish us with much assistance in ascertaining the meaning of the expression here. Sometimes the expression would appear to refer to the State of Rhodesia,⁵⁴⁾ sometimes to the Government of Rhodesia,⁵⁵⁾ whilst at other times it could be interpreted as referring either to the State or to the Government or perhaps both.⁵⁶⁾

In/...

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- 54) S. Res. 253 (1968) preamble commencing with the words "Gravely concerned", paragraph 12.
- 55) See for example the various references to the régime in the preamble to A. Res. 2151 (XXI) and in paragraphs 2, 3, 4, 5, 8, 10, 11. The use of the words "illegal racist minority régime" in all these instances would appear to give a more precise meaning to the word "régime" as denoting the government: S. Res. 253 (1968) preamble commencing with the word "Condemning", §§ 4, 5(a), 5(b); A. Res. 2383 (XXIII), preamble commencing with the words "Deeply concerned", §§ 3, 4, 7, 9(a), 10.
- 56) See S. Res. 232 (1966) §5; A. Res. 2383 (XXIII) preamble commencing with the words "Bearing in mind", §5.

In conclusion, it is submitted, that though the matter is not free from doubt, in view of the provisions of paragraph 1 of the resolution, the Security Council intended in paragraph 2 to impose a duty not to recognize the State of Rhodesia on members of the United Nations.

(11) Given then that member states of the United Nations are prohibited from recognizing the State of Rhodesia, is this prohibition general or does it only extend to prohibit recognition of the State of Rhodesia in its republican form? The writer is of the view that the prohibition only applies to recognition of the Republic of Rhodesia for the following reasons.

(A) If paragraphs 1 and 2 of the resolution are read together they would appear to lead to such an interpretation of the resolution. Paragraph 1 condemns the proclamation of republican status and paragraph 2 decides that member states shall refrain from recognizing this illegal régime. The use of the word "this" is highly significant for it provides a vital link between the entity which is not to be recognized and the republican status of the territory. It is thus the republican status which should not be recognized.

(B) One of the reasons given by the Council for the introduction of this measure of prohibition inter alia is the Proclamation of the Republic. In the preamble to the resolution the Security Council notes with grave concern:

"(d) /...

"(d) That the situation in Southern Rhodesia continues to deteriorate as a result of the introduction by the illegal régime of new measures, including the purported assumption of Republican status, aimed at repressing the African people in violation of General Assembly resolution 1514 (xv)."

Since the new measure involving the proclamation of a Republic is the prime motivating reason for the imposition of the duty not to recognize, it can be inferred that the duty should refer to that new situation. In fact it can be said that the Security Council resolution in question was precipitated by the Proclamation of the Republic of Rhodesia and was passed within sixteen days of the assumption of republican status by Rhodesia.⁵⁷⁾

The conclusion from all that we have said is that member states of the United Nations have an international law obligation, imposed by the Security Council, not to recognize the Republic of Rhodesia.

(iii) We must now consider whether the above obligation not to recognize the State of Rhodesia is limited to the grant of full, i.e. de iure recognition, or whether it extends to more limited forms of recognition such as de facto recognition.⁵⁸⁾ In general there would appear to be

controversy/...

57) Rhodesia became a republic on 2nd March, 1970. On the very same day the Secretary General of the United Nations, U Thant called on members of the Security Council of the United Nations to hold an emergency meeting of the Council to consider the Rhodesian decision. See Die Burger, 3rd March, 1970, p.1. The meeting was set down originally for the 11th March, 1970, but was adjourned. See Die Burger, 11th March, 1970, p.3. The Resolution was eventually adopted on 18th March, 1970.

58) For discussion of the nature of limited and de facto recognition see supra, pp. 198-201.

controversy on the question whether or not recognition de facto is contrary to an obligation not to recognize. Thus the Advisory Committee set up by the Assembly of the League of Nations in relation to the non-recognition of Manchuko was of the view that recognition de facto would not be compatible with the obligation of non-recognition.⁵⁹⁾ On the other hand Haile Selassie stated to the League Council in 1938 that de facto (but not de iure) recognition of the Italian conquest of Abyssinia would not be contrary to an obligation not to recognize.⁶⁰⁾ Lauterpacht agrees with the latter view.⁶¹⁾ He bases his view on the provisional character of de facto recognition which emphasises the absence of any obligation to continue the recognition.⁶²⁾ As such it may be deemed to be compatible with the limited purpose of the necessarily imperfect sanction of non-recognition.

It is submitted however that the above controversy only has relevance when the duty not to recognize is imposed without elaboration. If the instrument creating the duty not only imposes the obligation but also describes the extent of that obligation, the question merely resolves itself into one of construing the instrument in question to establish what is allowed and what is prohibited. The resolution of the Security Council in question⁶³⁾ does elaborate upon/...

59) Lauterpacht, p. 347.

60) Ibid.

61) Ibid., p. 348.

62) De facto recognition can in principle be withdrawn. Starke, pp.153-154. Brownlie, p. 87 and O'Connell, I, p. 159 while admitting this general proposition criticise it.

63) S. Res. 277 (1970)

upon the prohibitions which it imposes. We therefore turn to its terms to see if it imposes a prohibition on limited recognition of the State of Rhodesia. In particular here we may refer to paragraph 3 which obliges member states not to recognize any act of any official or institution of the régime. This, it is submitted, not only prohibits recognition de facto of Rhodesia⁶⁴⁾ but goes so far as to prohibit any degree of recognition even though such limited recognition might fall far short of de facto recognition.

It must now be asked whether the imposition of this obligation not to recognize Rhodesia can affect any recognition which might have been accorded to Rhodesia before 18th March, 1970. It is submitted that it does not, for the following reasons.

(A) The Security Council of the United Nations can, in my view, only make binding legal decisions on four matters. In the first place it can make a legally binding determination that certain conduct constitutes an act of aggression. In the second place, it can determine a breach of the peace. In the third place, it can determine that a situation constitutes a threat to international peace.⁶⁵⁾ In the exercise of these three functions we/...

64) If recognition de facto is accorded this implies that at least the acts of the régime may be recognized as having effect within the territory of the state in question. See Aksionairnoye Obschestvo A.M. Luther v. Sagor (James) and Co. [1921] 3 K.B. 532; Bank of Ethiopia v. National Bank of Egypt and Liguori [1937] Ch. 513; The Arantzazu Mendi [1939] A.C. 256; See too the list of authorities quoted by O'Connell, I, p. 186. See too Brownlie, p. 88; Starke, p. 156.

65) Charter of the United Nations, Article 39.

we see the Council in an essentially judicial role.⁶⁶⁾

In its fourth function we see the Council in an essentially legislative role. After making any of the above determinations the Council may by resolution impose obligations on member states of the United Nations or oblige member states to submit to activities taken by it or some other entity on its behalf.⁶⁷⁾ Beyond these functions however, its judicial and legislative capacities do not extend.

Thus for instance, the Security Council, it is submitted, has no competence to alter the existing status of a territory - not even in the exercise of its peace-keeping functions.⁶⁸⁾ Were the Security Council/...

66) In the Advisory Opinion on South West Africa, note 41) supra, paragraph 117, the court would seem to allow general judicial powers to the Security Council, and in paragraphs 103, 105, 106 it even appears to go so far as to concede binding judicial powers to the General Assembly!

67) Charter of the United Nations, Articles 25, 39, 41, 42.

68) Thus it is submitted that the Security Council (and for that matter the General Assembly) did not have the capacity to terminate the Mandate for South West Africa because in doing so it would be altering the legal status of the territory, something which the Charter gives it no power to do. The World Court has held however that it has such power and not only the Security Council but also the General Assembly. See Advisory Opinion on South West Africa, note 41) supra, paragraphs 103, 105, 106, 117. See too, C.J.R. Dugard, "The Revocation of the Mandate for South West Africa" (62) A.J.I.L., 1968, at p. 95. W.M. van der Westhuizen, "Die Bevoegdheid van die Verenigde Volke om Die Mandaat vir Suidwes-Afrika te beëindig" (31) T.H.R.-H.R., 1968, pp. 344-345. It is submitted however that what the Security Council could do would be to impose an obligation on South Africa to hand over control of the territory or even an obligation to co-operate with the General Assembly in dissolving the Mandate. But it could not simply alter the status of the territory as such by terminating the Mandate. See here the dissent of Judge Sir Gerald Fitzmaurice in the above Advisory Opinion in which he held that: "Even where the Security Council is acting genuinely for the preservation or restoration of peace and security, it has no competence as part of that process to effect definitive and permanent changes in territorial rights, whether of sovereignty or administration - and a mandate involves, necessarily, a territorial right of administration, without which it could not be operated." See (10) I.L.M., 1971, pp. 788-789. See too the attitude of the British

Council to make the provisions of the resolution under question retrospective it would in effect be attempting to alter any international status possessed by the territory of Rhodesia by virtue of recognition previously accorded to it. It is one thing to impose an obligation not to recognize Rhodesia in the future, it is something quite different and, it is submitted, something beyond the competence of the Security Council to interfere with the vested status of a territory. Its legislative competence is simply not so extensive as to be effective in the latter instance.

(B) In any event the resolution in question does not purport to be retrospective. On the contrary, the Security Council in paragraph two decides that member states "shall refrain from recognizing" the régime. The resolution must therefore be contrasted with past resolutions where the Security Council has intended obligations to be retrospective and has specifically so stated in words.⁶⁹⁾

(C) As previously stated, the resolution probably refers only to recognition of the Republic of Rhodesia.

This/...

68) concluded from previous page:

... Foreign Secretary, Mr. Stewart on the question of the status of the Falkland Islands. The British view was that the United Nations was not competent to decide questions of sovereignty. The Times, 14th January, 1966, p. 9(c). It is submitted that these latter views are preferable to the former ones being more in accordance with the Charter.

69) See S. Res. 253 (1968) paragraph 7 where the Security Council "Decides that all States Members of the United Nations shall give effect to the decisions set out in operative paragraphs 3, 4, 5 and 6 of this resolution notwithstanding any contract entered into or licence granted before the date of this resolution."

This only came into being on 2nd March, 1970. It is therefore unlikely that the resolution was intended to have a retrospective effect prior to this date.

From the above considerations it is submitted that the resolution is not retrospective in operation on the question of non-recognition. It is further submitted that it could not be so retrospective and thus any recognition accorded to Rhodesia previously and any resulting status acquired by Rhodesia is unaffected by the resolution.

We may now summarise the effect of the resolution.

1. It prohibits both full and limited recognition of the State of Rhodesia in Republican form.
2. It does not operate retrospectively.

(b) Obligations not to recognize under Article 2 (5) of the Charter.

Article 2(5) provides:

"All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action."

It is argued that the Security Council is taking action against Rhodesia. The giving of recognition to a régime which the United Nations is trying to bring down must surely be regarded as giving "assistance" to that régime. Thus such recognition is a clear violation of the spirit of Article 2(5).⁷⁰⁾

Dr. Akehurst says that recognition of Rhodesia would be a

violation/...

70) Michael Akehurst, "State Responsibility for the Acts of Rebels - an Aspect of the Southern Rhodesian Problem" (43) B.Y.I.L., 1968-1969, p. 49 at pp. 55-56.

violation of the spirit of Article 2(5) because Rhodesia is not regarded as a state by the United Nations.⁷¹⁾ It is submitted however that one need not rely on the spirit of the Article in question because, as previously discussed, Rhodesia is a state regardless of the subjective view of the United Nations, statehood being a fact.⁷²⁾ There is thus no objection to the proposition that recognition could be a violation of the letter of Article 2(5).

There are however two points of difficulty here. In the first place, would recognition amount to the giving of "assistance" to Rhodesia? It may be doubted whether strictly speaking recognition can amount to "assistance". The theories relating to the function of recognition would be of relevance. If recognition is of a declaratory nature it is very difficult to see how it could amount to "assistance" as it is merely an acknowledgment of an existing factual situation. On the other hand if recognition is constitutive in character,⁷³⁾ the argument that it can amount to "assistance" is stronger. But even on this view it is open to doubt whether the bestowal of an international status on an entity through recognition amounts to "assistance". The latter would seem to imply something in the nature of more positive help, succour, relief, backing, sustenance or benefit. The furnishing of recognition may merely amount to encouragement without amounting to concrete assistance.

In/...

71) Ibid., p. 55.

72) Supra, pp. 159, 169.

73) And in the view of the writer it is constitutive. See supra, p. 281.

In the second place there is a difficulty which seems to be inherent in the provisions of Article 2(5). If this article is taken literally, it would seem to impose a variety of obligations of assistance or non-assistance, as the case might be, over and above the obligation to observe the specific decisions of the Security Council as provided for in Articles 25, 48 and 49. Thus the effect of Article 2(5) could conceivably be to render these other Articles meaningless because it imposes the widest variety of obligations once the Security Council does take enforcement or preventive action against a state⁷⁴⁾ as in the case of Rhodesia. To overcome this difficulty it is suggested that Article 2(5) should be interpreted in the light of Articles 25, 48 and 49 and that its meaning should be restricted by the content of these articles. This would mean that "assistance" or "non-assistance" within the meaning of Article 2(5) would amount to the observance of the decisions of the Security Council which are binding on member states in accordance with Articles 25, 48 and 49 and no further. It is readily admitted however that there is no support for the writer's suggestion to overcome the difficulty here. It is further conceded that the writer's suggestion amounts to an assertion that Article 2(5) itself is superfluous in view of the provisions of Articles 25, 48 and 49.

If/...

74) For a full discussion of the meaning of enforcement or preventive action here see Hans Kelsen, The Law of the United Nations, London, 1951, pp. 91-94.

If, on the other hand. Article 2(5) is not superfluous, and if recognition amounts to assistance to Rhodesia, there would appear to be a duty not to recognize Rhodesia under Article 2(5). In view of the fact that there is already a duty not to recognize Rhodesia under S.Res. 277 (1970) it may be asked whether the present duty, assuming it to exist, has any practical significance. It is submitted that it would have practical significance in the following respects. It would apply to all forms of recognition both full, i.e. de iure, and limited, because once it is admitted in principle that recognition may amount to "assistance", then of necessity all species of recognition must also amount to "assistance". In addition the duty would have existed as early as 9th April, 1966 when the Security Council first took enforcement measures against Rhodesia.⁷⁵⁾ On the other hand the duty not to recognize under S. Res. 277 (1970) only came into being on 18th March, 1970. Further the duty not to recognize under Article 2 (5) would certainly apply to the State of Rhodesia whereas, as we have seen,⁷⁶⁾ it is not altogether beyond doubt whether the duty under S. Res. 277 (1970) applies to the State of Rhodesia, the Government of Rhodesia or both the State and the Government of Rhodesia though the submission was that it applied to both.

In conclusion we must make one important observation. Both the duty not to recognize under S. Res. 277 (1970) and that under Article 2 (5) of the Charter can of course only bind member states of the United Nations.

(3)/...

75) S. Res. 221 of 1966.

76) Supra, pp.308 et seqq.

- (3) The obligation not to recognize a state which is constitutionally based on the denial of the right of self-determination.

It has been argued that from the emerging acceptance of self-determination, since at least 1948, as a basic principle of law and government, state practice has developed a common policy in the international community that new régimes constitutionally based on the denial of the right of self-determination shall not be recognized.⁷⁷⁾ It is apparent that this duty not to recognize, if admitted, would be based entirely on the existence of a right of self-determination in international law. The question of the existence of such a right is examined later in this work and the writer's conclusion is that such a right has not emerged in contemporary international law.⁷⁸⁾ That being so, the submission is that there is no duty not to recognize here.⁷⁹⁾

80)

Effects of recognition accorded in contravention of a duty not to recognize.

As we have seen, the duty not to recognize exists only in relation to premature recognition and treaty obligations not to recognize. From our discussion it will also be apparent that only the latter category of duty is relevant in the case of Rhodesia in that there may be duties not to recognize Rhodesia under S. Res. 277 (1970) and Article 2(5) of the Charter of the United Nations. If a member state of the United Nations
were/...

77) J.E S.F in (34) M.L.R., 1971, p. 417.

78) Infra, pp.472-520, in particular at p. 520.

79) Chen, pp. 60, 61 further points out that the introduction of extraneous requirements for recognition (other than the traditional ones) such as degree of civilization, legitimacy of origin, religious creed or political system would shift the basis of recognition to nebulous intractable considerations. Not even violence of origin is a bar to recognition nor the unwillingness of a new state to observe international law.

80) This was previously discussed by the writer, note 11) supra, pp. 155-156, 166.

were to accord recognition to Rhodesia, two questions would arise as to the effect of such recognition.⁸¹⁾ In the first place, it would be asked whether the recognition was lawful and in the second place, whether it was valid.

(1) Lawfulness of such recognition.

In dealing with this question writers usually discuss the lawfulness of premature recognition but the argument they adduce is of course applicable mutatis mutandis to recognition prohibited by treaty.

Some writers say that the grant of recognition in such cases is not illegal. Thus Anzilotti says that international law does not know legal or illegal recognition,⁸²⁾ whilst Liszt would appear to regard premature recognition as being merely an unfriendly act.⁸³⁾ Le Normand says in relation to premature recognition:

"La reconnaissance prématurée est-elle bien une intervention? Il semble que non, puisque l'Etat qui la fait n'exige pas que l'Etat ancien se comporte de telle ou telle façon".

and this is so although:

"L'Etat ancien verra donc avec raison une lésion de sa personnalité dans tout reconnaissance accordée en dehors de ces conditions."⁸⁴⁾

However it is clear that with the exception of the above, writers generally have condemned premature recognition as being illegal.⁸⁵⁾

Chen/...

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- 81) It is submitted that a non-member state of the United Nations could recognize Rhodesia with impunity. Such recognition would operate in the ordinary way to create an international personality in Rhodesia which would be relative in that it would exist only against the recognizer. See discussion supra, pp. 279, 281, 320.
- 82) D. Anzilotti, Cours de Droit International, (Tr. Gidel), Paris, 1929, I, p. 169.
- 83) See Chen, pp. 50-51.
- 84) P. 250
- 85) Chen, pp. 50-51; Lauterpacht, p. 8; David A. Ijalaye, "Was Biafra at any Time a State in International Law?" (65) A.J.I.L., 1971, p. 551 at p. 559; A.J.G.M. Sanders, "Die Erkennung van State en Regerings" (33) T.H.R.-H.R., 1970, p. 259 at p. 262.

Chen says that premature recognition is an act of intervention and an international delinquency and that this is common to both the constitutive and declaratory schools of recognition.⁸⁶⁾ It is submitted that this is certainly correct. For if there is a duty not to recognize then breach of that duty must surely be an international tort.⁸⁷⁾ The conclusion then is that recognition of Rhodesia by a member state of the United Nations would be an international tort.

Whenever an international tort is committed, international responsibility is incurred by the wrongdoer⁸⁸⁾ and an obligation to make reparation to the states to whom the obligation was owed arises.⁸⁹⁾ In this case the duty not to recognize is a duty owed under the Charter of the United Nations and hence it is owing to all the other parties to the treaty - the member states of the United Nations both collectively and individually.

The ideal form of reparation for a wrong is restitutio in integrum⁹⁰⁾ if this is possible. The essential principle is to wipe out all the consequences of the illegal act but if this is not possible reparation can take other forms which will shortly be discussed.⁹¹⁾ In the case of recognition of Rhodesia it would be difficult for

restitutio/...

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- 86) P.54. See too Lauterpacht, p. 8 and H. Kelsen, "Recognition in International Law - Theoretical Observations" (35) A.J.I.L., 1941, p. 605 who says at p. 609 that such recognition is a violation of international law and an infringement of the rights of other states.
- 87) Oppenheim, International Law, 8th Ed., London, 1955, I, p. 337.
- 88) Ibid.
- 89) Clyde Eagleton, "Measure of Damages in International Law" (29) Yale Law Journal, 1929-1930, p. 52; Oppenheim, note 87) supra, p. 353; Chorzow Factory case, P.C.I.J. Ser. A. 17, no.13, p. 29. The wronged state has a right to request the performance of such acts as are necessary for the reparation of the wrong done.
- 90) Schwarzenberger, I, p. 656 describes the content of what he calls restitutio in pristinum. It necessarily excludes any form of reparation which either falls short of, or goes beyond, the purpose of re-establishing the harmony which existed before the tort.
- 91) Eagleton, note 89) supra, p. 53; Schwarzenberger, I, pp.656, 657; Chorzow Factory case, note 89) supra, p.47; Martini case, (Italy v. Venezuela) (1930) (2) R.I.A.A. 975 at 1002.

restitutio in integrum to take place because in principle de iure recognition cannot be withdrawn. On the other hand if the type of recognition afforded was de facto recognition, withdrawal would be a possibility⁹²⁾ and so restitutio in integrum might be an appropriate remedy.

Apart from the question of restitutio in integrum the question of making reparation for damage caused would also arise. Here we must draw a distinction between material and non-material damage and consider the appropriate forms of satisfaction for each and in favour of whom the forms of satisfaction might exist.

(a) Material damage.

This is actual economic loss suffered. Compensatory damages of a pecuniary nature⁹³⁾ should be paid to the victim which suffered loss.⁹⁴⁾ The calculation of the amount of the loss may be difficult but it can be said that hypothetical and entirely conjectural losses should not be awarded. According to Eagleton it is only where a loss can be calculated with a reasonable degree of certainty that compensation in respect of it should be allowed.⁹⁵⁾ A further requirement is that the loss should have been caused by the illegal act.⁹⁶⁾

Applying the above principles, it is submitted that if a

member/...

92) Supra, p. 200.

93) Pecuniary damages are the rule but occasionally by way of exception compensation for material loss might take another form, e.g. cession of territory. J.B.Moore, A Digest of International Law, Washington, 1906, VI, §1061 et seqq.

94) Oppenheim, note 87) supra, pp. 353-354; Eagleton, note 89) supra, p. 53.

95) Ibid. p. 75.

96) Ibid. p. 74.

member state of the United Nations suffered material loss as a result of the wrongful recognition of Rhodesia, it would be entitled in principle to claim pecuniary compensation from the recognizer ⁹⁷⁾ It is difficult however to see such a claim lying in the case of the wrongful recognition of Rhodesia because of the unlikelihood of this act causing material loss.

(b) Non-material damage.

The infringement of the treaty rights of member states of the United Nations by the unlawful recognition of Rhodesia would certainly give rise to claims for satisfaction in respect of non-material damage. This claim might lie at the instance of any member state of the United Nations or in favour of the members collectively. We must now consider the possible forms of satisfaction which might be demanded here.

(i) Apology.

This is the very least that could be demanded. ⁹⁸⁾

(ii) Damages.

Pecuniary damages for breach of obligation might be demanded even though no material loss has been suffered.

There is adequate authority for the award of such damages.

Substantial/...

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- 97) In this regard the Panamanian secession from Colombia in 1903 provides an interesting example of the consequences of wrongful recognition, in casu premature recognition. The United States immediately recognized Panama and even went so far as to prevent Colombia from reasserting its authority over Panama. The controversy which ensued from this unjustified intervention was only settled finally by a treaty in 1922 under which a payment of \$50 million compensation was made to Colombia. See Oppenheim, I p. 125 the writer, note 11) supra, p. 155.
- 98) Oppenheim, note 87) supra, p. 354; Moore, note 93) supra, §1061 et seqq.

Substantial satisfaction has in the past been awarded for serious derelictions of international duties.⁹⁹⁾ Thus awards have been made for denials of justice,¹⁰⁰⁾ indignity suffered, grief sustained and other similar wrongs to aliens.¹⁰¹⁾ In addition awards have been made for mere moral and political injury resulting from failure to observe the rules of international customary law and conventions.¹⁰²⁾ Thus the United States was adjudged to pay Canada \$25,000 as non-material damages for a breach of the freedom of the seas.¹⁰³⁾ Sometimes the pecuniary compensation payable here is styled punitive, vindictive or exemplary damages. In essence, however, they are not such, but are merely compensatory for non-material damage. International courts and tribunals lack the power to award truly punitive damages, i.e. damages which have a penal element in that they amount to an expression of disapprobation of the tort.¹⁰⁴⁾

(iii) Condemnation by an international tribunal.

In certain cases the mere moral judgment implied in a purely declaratory judgment has been regarded as a commensurate form of reparation. In the Corfu Channel (Merits)/...

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- 99) Eagleton, note 89) supra, p. 55; James case (1926) (4) R.I.A.A. 82.
100) Eagleton, note 89) supra, p. 55.
101) Stephens claim (1927) (4) R.I.A.A. 265 at 266.
102) The Carthage (France v. Italy) H.C.R. (1916) 329 at 335; The Manouba (France v. Italy) H.C.R. (1916) 341 at 349.
103) I'm Alone (1935) (3) R.I.A.A. 1609.
104) Schwarzenberger, I, p. 673. But in the past states have on occasions claimed punitive damages and some writers approve of them. See Eagleton, note 89) supra, pp. 62-63, 64-65.

(Merits) case,¹⁰⁵⁾ the court regarded its own declaration as to the violation of Albanian sovereignty as appropriate satisfaction for the wrong inflicted on Albania. In the Carthage and Manouba cases¹⁰⁶⁾ similar views were expressed.

In the former case the court said:

"If a Power should fail to fulfill its obligations, whether general or special, to another Power, the establishment of this fact, especially in an arbitral award, constitutes in itself a serious sanction." 107)

In the event of such satisfaction as aforesaid being due and not forthcoming, the aggrieved state or states might bring proceedings before the International Court of Justice if all the states in question were parties to the Statute of World Court and the case was one which fell within the jurisdiction of the latter.¹⁰⁸⁾ Failing appropriate satisfaction the aggrieved state or states might also resort to reprisals by way of self-help.¹⁰⁹⁾

In the event, therefore, of an unlawful recognition of Rhodesia the member states of the United Nations might, collectively or individually, make the aforesaid claims
against/...

105) I.C.J. Rep. 1949, 35 at 35-36.

106) Note 102) supra.

107) The Carthage, note 102) supra, at 335.

108) See Article 36 of the Statute of the World Court. The judgment of the World Court might then conceivably constitute a sufficient sanction.

109) The reprisal is a measure which if taken in isolation, would be unlawful, but may be taken exceptionally when one state violates the rights of another state. It is taken for the sole purpose of forcing the delinquent state to abide by the law. It is subject to the rule of reasonable proportionality and it must not involve the threat or use of force contrary to Article 2 (4) of the United Nations Charter. See Sorensen, pp. 753-754. On the latter see however Derek Bowett, "Reprisals Involving Recourse to Armed Force" (66) A.J.I.L., 1972, p.1.

against the recognizer and take the actions indicated above against it. In the case of reprisals being taken against the recognizer, these could be instituted by the individual member state acting unilaterally but there is no reason why they could not be taken collectively within the framework of the United Nations organization itself.¹¹⁰⁾

(2) Validity of recognition granted in contravention of a duty not to recognize.

Even if it is conceded that an act of recognition is undoubtedly unlawful, it still remains to be decided whether that act is valid or invalid. If valid the act, though unlawful, will produce legal consequences and will create a personality in the entity recognized.¹¹¹⁾ If invalid, the act will naturally produce no such consequences.¹¹²⁾

It is apparent that there is a real distinction between unlawfulness and invalidity and that an unlawful act is not necessarily also invalid. Jennings points out that the juridical consequences of illegal acts are of much wider scope than the claim to reparation, involving also the question of validity or invalidity.¹¹³⁾

E.Lauterpacht/...

110) Reprisals here would not include action taken by the Security Council of the United Nations against a recognizer under Chapter VII of the Charter. Such action would not be a true reprisal because it could be taken against a recognizer whether recognition was lawful or unlawful. The legality of Security Council action does not depend on the existence of prior unlawful conduct. See the writer, "Rhodesia and the United Nations, the Lawfulness of International Concern; A Qualification" (2) C.I.L.S.A., 1969, p. 454 at pp.454-455. But the legality of a reprisal is entirely dependent on prior conduct.

111) See supra, p. 281 where the nature and effects of recognition are discussed.

112) R.Y.Jennings, "Nullity and Effectiveness in International Law", Cambridge Essays in International Law, London, 1965, p. 64 at p.66 points out that acts performed by an entity without capacity are null (invalid) in the sense of being non-existent.

113) Jennings, note 112) supra, pp. 64, 73.

E. Lauterpacht states that there can be various classes of illegal acts, only some of which attract the penalty of nullity.¹¹⁴⁾ Honoré points out that it is a familiar feature of legal systems that unlawful acts create rights and that conduct is not merely permitted or prohibited but permitted or prohibited with greater or lesser insistence. Thus legality and validity cannot be identified.¹¹⁵⁾

The problem of the validity or invalidity of an unlawful act of recognition is a difficult one and controversy exists on the particular topic. The following authorities can be quoted in support of the assertion that illegal recognition is also invalid.

Kuntz states that no amount of recognition can supply the lack of requirements laid down by international law for independent statehood and that recognition (naturally premature) in such a case would be simply ineffective in law.¹¹⁶⁾ Similar views are expressed by Ijalaye,¹¹⁷⁾ Redslob,¹¹⁸⁾ the tribunal in the Cuculla Arbitration¹¹⁹⁾ and/...

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- 114) E. Lauterpacht, "The Legal Effects of Illegal Acts of International Organizations", Cambridge Essays in International Law, London, 1965, p.88 at p. 117. The same writer points out (p.121) that even where an act is null, the nullity may be relative, i.e. it may be valid against some states, invalid against others.
- 115) A.M.Honoré, "Reflections on Revolutions" (2) Irish Jurist (n.s.) 1967, p. 268 at pp. 268, 269. On the question of the relationship between validity and effectiveness see Marinus Wiechers, "South West Africa: The Background, Content and Significance of the Opinion of the World Court of 21 June 1971" (5) C.I.L.S.A, 1972, p.123 at pp. 167-168.
- 116) J.L. Kuntz, "Critical Remarks on Lauterpacht's 'Recognition in International Law'" (44) A.J.I.L., 1950, p. 713 at p. 718.
- 117) Note 85) supra, pp. 558-559 who says that the validity of any declaration of recognition depends on whether or not the entity has fulfilled the requirements of statehood. Premature recognition is a clear example of an illegal and thus invalid recognition. The results are then applied to the recognition of Biafra. For a contrary view in which recognition of Biafra was asserted to be valid (though unlawful as being premature) see the writer, note 11) supra, pp. 153, 155-156.
- 118) Chen, pp. 50-51 quotes Redslob as saying that premature recognition has no legal effect.
- 119) U.S v. Mexico (1876) Moore's International Arbitrations, III, p. 2873 at pp. 2876-2877.

and the Kenny Arbitration.¹²⁰⁾ Lauterpacht is ambivalent. He merely asserts that premature recognition is probably also invalid.¹²¹⁾

There is one observation which we can make about all the above views. They all relate to the question of the duty not to recognize prematurely and not to treaty duties not to recognize, such as are in question here. In addition, the reason given for the invalidity of premature recognition is, where relevant, the absence of the criteria of statehood in the recognized entity. Such considerations do not necessarily apply in the case of treaty duties not to recognize. Here the criteria of statehood may well be present and in the case of Rhodesia it was indeed submitted that they were.¹²²⁾ Thus the underlying basis for the alleged invalidity of recognition is not present in the case of the duty not to recognize Rhodesia. This means that the above views in relation to the invalidity of recognition are in all probability not apposite in considering the duty not to recognize Rhodesia.

On the other hand there are views which maintain that unlawful recognition is valid - even if it is premature. Jennings says that it is possible to find situations in which the idea of nullity is completely ousted and the legal effectiveness of the wrongful act is accepted without any subtraction. He then cites premature recognition of a new state, which he says is acknowledged to be a wrong even in classical law, and which is yet accepted as producing the totality of legal effects produced by a justified recognition/...

120) Ibid., p. 2883. Recognition is based on pre-existing fact and if this does not exist the recognition is falsified. See Chen, pp. 147-148.

121) At p. 9.

122) Supra, p. 169.

recognition.¹²³⁾ Sir Gerald Fitzmaurice is of the same view¹²⁴⁾ and Professor Nkambo Mugerwa even goes so far as to say that

"if the régime recognized lacks the essentials of a state, to recognize it is to constitute it a subject of international law." 125)

It is submitted that the views upholding the validity of premature recognition are preferable. Recognition accorded in breach of a treaty duty to recognize would a fortiori be valid as the arguments requiring a factual basis for recognition would, as we have seen, be inapplicable here because the factual basis (the objective criteria of statehood) would normally be present. This submission is bolstered by the following arguments.

In the first place an analogy can be drawn with the position relating to conflicting treaties. State A concludes a treaty with State B. At a later stage State A concludes a conflicting treaty with State C. The conclusion of the latter treaty is unlawful in relation to State B, because State A may now be unable to discharge its obligations. But the treaty is valid in relation to State C and is creative of rights and duties as between A and C. Sir John Fischer Williams states that the new treaty is a good and binding instrument as between the states parties to it, even if it violates pre-existing

treaty/...

123) Note 112) supra, p. 73.

124) "Ex Injuria non Oritur ius" (2) H.R. 1957, p. 117 at p. 124. Premature recognition of a seceding state though a wrong against the mother state produces full legal consequences between recognized and recognizer.

125) Sorensen, p. 278.

treaty rights. The aggrieved party has no authority to make it void.¹²⁶⁾ If then a state can conclude a valid bilateral consensual act, such as a treaty, even when in conflict with existing treaty obligations, then a fortiori a state may perform a valid unilateral consensual act such as recognition, though this may be in conflict with existing treaty obligations.

In the second place if an act of recognition is invalid it is difficult to see how it could amount to a wrong. And yet the overwhelming weight of authority supports the view that certain types of recognition are unlawful. For if recognition is invalid it cannot have any legal consequences. Thus it cannot create any situation the existence of which is adverse to the interests of the state entitled to insist on non-recognition. On this view an act of recognition would only be unlawful precisely for the reason that it was valid in that it created a situation whereby the interests of another state were affected!~

We are now in a position to summarize the effects of recognition accorded to Rhodesia. They are as follows:

(1)/...

126) "The New Doctrine of Recognition" (18) Transactions of the Grotius Society, 1932, p. 109 at p.121. Sir John however would make (and it is submitted correctly) a very limited exception with regard to treaties which transgress a general overriding rule of international law, examples of which he finds not easy to discover but suggests a treaty to revive the slave trade as an example. Cf. Brownlie, p. 501. Art. 53 of the Vienna Convention on the Law of Treaties, 1969 which provides that treaties shall not conflict with "peremptory norms of general international law". H. Lauterpacht, "The Covenant as 'Higher Law'" (17) B.Y.I.L., 1936, p. 54 at p.60 suggests however that treaties which are inconsistent with previous treaties are invalidated. Lauterpacht argues that the third state has concluded a treaty with a state whose contractual capacity has been limited (by the first treaty). To the extent of the incapacity, the second treaty is inoperative. It is submitted that Sir John's views are preferable. They would now appear to be inherent in the codification of the Law of Treaties - the Vienna Convention, 1969, Article 30. For a discussion of such conflicts see O'Connell, I, pp. 272-277.

- (1) Member states of the United Nations which accorded recognition to Rhodesia would do so in violation of their obligation under Article 25 of the Charter to obey binding resolutions passed by the Security Council.¹²⁷⁾ They might possibly also violate Article 2 (5) of the Charter. Such violations would be international torts for which international responsibility would be incurred to the other member states of the United Nations collectively and individually. Non-member states of the United Nations could lawfully recognize Rhodesia because such recognition would no longer be premature.
- (2) Even though the recognition accorded by a member state of the United Nations would be a breach of international obligation, the act of recognition would be valid and would have the effect of establishing an international personality in Rhodesia. The emerging personality would of course only be relative in that it would exist against the recognizing state only.

Juristically we would here have a valid but unlawful act. The act of recognition would be a validly performed juristic act in that it would achieve the desired legal effect, namely the creation of an international personality in the recognized entity. But at the same time the creation of that personality would be a wrong against other member states of the United Nations to whom the recognizer would be internationally responsible.¹²⁸⁾

SECTION VI/...

127) The relevant resolution here being S. Res. 277 (1970).

128) For the application of this argument to the Biafran situation, a jurisprudential analysis of the concepts of unlawfulness and invalidity in relation to the act of recognition and for some municipal law examples of acts which are valid though unlawful, see the writer, note 11) supra, pp. 153, 155-156, 166. In general on the distinction between the concepts of unlawfulness and invalidity see Jennings, note 112) supra, and Lauterpacht, note 114) supra.

SECTION VI

RECOGNITION OF RHODESIA.

There are conflicting international law claims to complete sovereignty over the territory known as Rhodesia. On the one hand the State of Rhodesia claims to be independent and as such a full international person. As pointed out previously, this is the only possible interpretation to be drawn from the terms of the Unilateral Declaration of Independence¹⁾ and the attitude displayed by the Prime Minister of Rhodesia in statements to the effect that the United Kingdom had no powers over Rhodesia²⁾ and that there was no other authority in Rhodesia except his government.³⁾ In pursuance of this standpoint, Mr. Clifford Dupont was appointed as Officer Administering the Government in terms of the 1965 Constitution and in opposition to the Governor.⁴⁾ Further steps were progressively taken against the Governor, at this stage representing the British Government.⁵⁾ At no time in the ensuing years was the British Government allowed to exercise governmental power in Rhodesia either directly or through Sir Humphrey Gibbs.⁶⁾

On/...

- 1) Supra, pp. 129-130.
- 2) The Times, 13th November, 1965, p. 10(a).
- 3) The Times, 16th November, 1965, p. 12(a) (b).
- 4) The Times, 18th November, 1965, p. 12(a).
- 5) Sir Humphrey Gibbs' telephone was cut off and he was asked to vacate Government House. The Times, 17th November, 1965, p. 12(a). Mr. Smith explained that the reason for cutting off the telephone was to prevent Sir Humphrey and the British Government communicating. The Times, 18th November, 1965 p. 12 (b). Later Sir Humphrey was informed that the Rhodesian Government would not meet his household expenses and as he had no official standing he would be charged a rent for the house and furniture. The Times, 31st December, 1965, p. 10 (f) (g). At no time however does it seem that the Rhodesian Government contemplated the physical eviction of Sir Humphrey from Government House. The Times, 16th November, 1965, p.12 (a).
- 6) This was most dramatically demonstrated by the incident involving the exercise of the Royal Prerogative of Mercy by the British Government in Rhodesia. R H Christie, "Practical Jurisprudence in Rhodesia" (2) C.I.L.S.A., 1969, at p. 218. On this Beadle, C.J. held in Dhlamini v. Carter, N.O., 1968 (2) S.A. 467 (R., A.D.) at 469 that it would be strange if the United Kingdom Government, exercising no internal power in Rhodesia, was accorded the right to exercise one of the most important powers of internal government, the prerogative of mercy.

On the other hand the United Kingdom claims sovereignty over the territory of Rhodesia. That this is so is apparent from several factors which will now be described. The immediate reaction of Britain to U.D.I. was the dismissal of the Rhodesian Cabinet through the Governor⁷⁾ who was thereafter deemed to be the local repository of executive power on behalf of the British Government.⁸⁾ The United Kingdom Parliament then passed the Southern Rhodesia Act, 1965,⁹⁾ the relevant provisions of which are as follows:

- "1. It is hereby declared that Southern Rhodesia continues to be part of Her Majesty's dominions, and that the Government and Parliament of the United Kingdom have responsibility and jurisdiction as heretofore for and in respect of it.
- 2.(1) Her Majesty may by Order in Council make such provision in relation to Southern Rhodesia, or persons or things in any way belonging to or connected with Southern Rhodesia, as appears to Her to be necessary or expedient in consequence of any constitutional action taken therein."

This was followed immediately by the promulgation of the Southern Rhodesia (Constitution) Order, 1965 (1965 S.I. 1952), the leading provisions of which are:

- "2(1) It is hereby declared for the avoidance of doubt that any instrument made or other act done in purported promulgation of any constitution for Southern Rhodesia except as authorized by Act of Parliament is void and of no effect.
- (2) This section shall come into operation forthwith and shall then be deemed to have had effect from November 11th, 1965.
- 3(1) So long as this section is in operation -

(a)/...

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- 7) The Times, 12th November, 1965, p. 12 (a).
 - 8) This is apparent from the messages of Sir Humphrey Gibbs to the people of Rhodesia in which he asserts that he remains their legal governor: see The Times, 15th November, 1965, p. 10 (a); 24th December, 1965, p. 6 (a); from the statement of Mr. Harold Wilson, the British Prime Minister, that Sir Humphrey could only be dismissed at the Queen's Pleasure; The Times, 19th November, 1965, p. 12 (d); and from the content of the legislation passed by the United Kingdom which is now cited.
 - 9) Which received the Royal Assent at 1.32 a.m. on 16th November, 1965. See The Times, 16th November, 1965, p. 9 (f).

- (a) no laws may be made by the legislature of Southern Rhodesia, no business may be transacted by the Legislative Assembly and no steps may be taken by any person or authority for the purpose of or otherwise in relation to the constitution or re-constitution of the Legislative Assembly or the election of any member thereof; and
 - (c) Her Majesty in Council may make laws for the peace, order and good government of Southern Rhodesia, including laws having extra-territorial operation ...
- 4 (1) So long as this section is in operation -
- (a) the executive authority of Southern Rhodesia may be exercised on Her Majesty's behalf by a Secretary of State ...
- 6 It is hereby declared for the avoidance of doubt that any law made, business transacted, step taken or function exercised in contravention of any prohibition or restriction imposed by or under this Order is void and of no effect."

The effect of this legislation was to annul all acts taken by the executive and legislature after the Unilateral Declaration of Independence.

All executive and legislative authority was henceforth to be vested in the United Kingdom authorities who were to assume direct control.¹⁰⁾

The purpose of the assumption of such powers was to ensure that a government of Rhodesia remained in existence even though the Governor was unable to function, to forestall the rebel government and the creation of governments in exile.¹¹⁾

We have pointed out already that before U.D.I. Southern Rhodesia was a British colony and, from the point of view of international law, a dependency of the United Kingdom. Primary international personality was vested/...

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- 10) For a concise summary of the effects of the various actions taken thus far by the United Kingdom see Molteno, p. 265. The British attitude to its own assumption of complete power was not however entirely consistent. The Rhodesian Finance Minister is reported as commenting adversely on a statement by Mr. Arthur Bottomley that the British Government did not have the necessary authority in Rhodesian law to pay interest due on the Rhodesian public debt issued in London. The Times, 29th January, 1966 p. 7 (b). This attitude seems inconsistent with the plenary legislative powers of Her Majesty in Council, granted by the above legislation, which would enable the British Government to change the laws of Rhodesia to meet any possible eventuality!
- 11) The Times, 17th November, 1965, p. 9 (a) (b).

vested in the United Kingdom, the mother state, but it had conceded a limited international personality, operative in certain spheres, to the dependency.¹²⁾ From the point of view of international law, the actions taken by the United Kingdom after U.D.I. can be interpreted as a claim to withdraw any limited international personality which Rhodesia might have enjoyed prior to 11th November, 1965¹³⁾ and as a claim to vest sole and exclusive international personality in the United Kingdom itself, instead of primary personality as before. The British claim is a claim to complete sovereignty in international law over Rhodesia.

Pursuant to the above the United Kingdom has taken several important steps which are consistent with such an assertion of complete sovereignty over Rhodesia. Among them we may mention the following. The United Kingdom made provision for the confiscation of passports issued by the Rhodesian authorities.¹⁴⁾ Non-Commonwealth citizens wishing to visit Rhodesia were required to obtain visas from the British passport office.¹⁵⁾ Censorship in Rhodesia was revoked.¹⁶⁾ The British Government advised the Queen to inform Mr. Smith through the Governor that she could not act on his request for the appointment of Mr. Clifford Dupont as Governor-General.¹⁷⁾ It also attempted to exercise the prerogative of mercy on a number of occasions.¹⁸⁾ Representatives from Salisbury had taken
care/...

12) Supra, pp 89-90.

13) On the possibility of such withdrawal see discussion supra, p. 89.

14) Southern Rhodesia (Property in Passports) Order, 1965.

15) The Times, 20th November, 1965, p. 7 (b).

16) Southern Rhodesia (Revocation of Censorship) Order, 1965. This Order was considered by the Rhodesian courts in Central African Examiner (Pvt) Ltd. v. Howman and Others, NN.O., 1966 (2) S.A. 1 (R) but the court made no finding on the validity or otherwise of the Order in Rhodesian law.

17) The Times, 4th December, 1965, p.8 (c).

18) In the case of one Lazarus, convicted of attempted arson; The Times, 21st January, 1966, p. 12 (g); in the case of one Simon Runyowa also convicted of attempted arson; The Times, 22nd January, 1966, p. 8 (b); See too Dhlamini's case, note 6) supra.

care of Rhodesian interests at the British Embassies in Bonn, Washington and Tokyo before U.D.I. The British Government terminated such posts and with them the relevant Rhodesian missions.¹⁹⁾

We have now seen the respective claims of the United Kingdom and Rhodesia to the territory known as Rhodesia. It is apparent that these claims are diametrically opposed and are mutually exclusive. These conflicting claims are the essence of the international dispute between Rhodesia and the United Kingdom. It follows that in order to ascertain the international law status of Rhodesia it is necessary to ascertain which, if any, of the conflicting claims is valid. This reduces itself to ascertaining the attitude of third states to the position and here there are three possibilities:

- (1) the Rhodesian claim is recognized;
- (2) the British claim is recognized;
- (3) something other than the British or Rhodesian claims is recognized.

Each of these possibilities will now be examined seriatim.

(1) Recognition of Rhodesian claim to independence.

Recognition can be express, i.e. formal, or implied from conduct.

It is common knowledge that to date no state has formally recognized Rhodesia and so there is no express recognition of its claim to independence. On the contrary several states have explicitly declared that they do not recognize Rhodesia. Such statements amount to the use of the international law devices of protest and reservation of rights²⁰⁾ and they here rebut any possible suggestion
_____ of/...

19) The Times, 12th November, 1965, p. 8 (g); 17th November, 1965, p.9 (c); 10th December, 1965, p. 18 (d); 1st March, 1966, p.11 (b).

20) For discussion of the role of the devices see supra, pp. 131-133.

of implied recognition on the part of those states making them.

Naturally the United Kingdom is foremost among such non-recognizing states. This appears clearly from the certificate produced to the court in Madzimbamuto v. Lardner-Burke, N.O. and Another, N.O.

which reads:

"...I, the Right Honourable Arthur Bottomley, O.B.E., M.P., Her Majesty's Secretary of State for Commonwealth Relations, hereby certify as follows:

(a) Southern Rhodesia has since 1923 been and continues to be a colony within Her Majesty's dominions and the Government and Parliament of the United Kingdom have responsibility for and jurisdiction over it.

(b) Her Majesty's Government in the United Kingdom does not recognize Southern Rhodesia or Rhodesia as a state either de facto or de iure.

(c) Her Majesty's Government in the United Kingdom does not recognize any persons whomsoever as Ministers of the Government of Southern Rhodesia and does not recognize any persons purporting to be such Ministers as constituting a government in Southern Rhodesia either de facto or de iure." 21)

In addition recognition of Rhodesia by the United Kingdom would in any event be incompatible with the international law claims made by the United Kingdom which are described above.

Other states too have stated in so many words that they do not recognize Rhodesian independence. These include the United States,²²⁾ Canada,²³⁾ India,²⁴⁾ Japan,²⁵⁾ Switzerland²⁶⁾ and France.²⁷⁾

Other/...

- 21) 1968 (2) S A. 284 (R., A D.) at 285-286. See too statement that the agreement of November 1971 between Mr. Smith and Sir Alec Douglas-Home was not to imply any change in the attitude of either party to the status of Rhodesia. Cape Times, 26th November, 1971; Cmd. R.R. 46 - 1971, p. 9. See too certificate submitted to the Court in Adams v. Adams, 3 W.L.R. 1970 at 946.
- 22) The Times, 12th November, 1965, p. 8 (g); Die Burger, 10th March, 1970. The Judicial practice of the United States also supports non-recognition of Rhodesia. See Shyu Jeng Shyong v. Esperdy, 294 F.Supp.355.
- 23) The Times, 12th November, 1965, p. 8 (g).
- 24) Ibid., p. 8 (c).
- 25) Ibid., p. 8 (d).
- 26) The Times, 18th December, 1965, p. 5 (d).
- 27) 20 U N S.C.O.R., 1258th Meeting, p. 3 (1965). At a later stage Belgium, Singapore and Uganda refused to recognize the Republic of Rhodesia. S/9853, Annex II, pp. 4, 46, 53.

Other states have declared that they do not recognize the Rhodesian Government, the Rhodesian regime or the "Smith régime". Though on the face of it these states specifically only declare their non-recognition of the Government of Rhodesia, it is submitted, that their intention in all the circumstances amounts to non-recognition of both State and Government of Rhodesia. The recognition of a new state often takes the form of recognition of government.²⁸⁾ It is thus possible that the form of non-recognition of a new state could also take the form of non-recognition of its government.²⁹⁾ In this category we find New Zealand,³⁰⁾ Denmark,³¹⁾ Sweden,³²⁾ Kenya,³³⁾ Norway,³⁴⁾ Israel,³⁵⁾ Czechoslovakia³⁶⁾ and the Soviet Union.³⁷⁾

Yet other states expressed their attitudes in a different manner but in such a way as to amount to an unequivocal statement of non-recognition. Thus the Malaysian Foreign Office said that Malaya remained unalterably opposed to Rhodesia's seizure of independence.³⁸⁾

The/...

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- 28) Lauterpacht, p. 29 who gives the following instances. The United Kingdom and the United States recognized both the state and government of Finland in 1919. The French recognition of Poland in 1919 was similar but the United Kingdom recognition here was in the form of "recognition of the government of Poland".
- 29) See P. Kleist, Die Völkerrechtliche Anerkennung Sowjetrusslands, Königsberg & Berlin, 1934, p. 19 who maintains that there can be no recognition of state without recognition of government. Hence non-recognition of government means non-recognition of state. This, it is submitted, goes too far. The implication of non-recognition of statehood can certainly be drawn from non-recognition of government but it is not the inevitable consequence of non-recognition of government. See discussion *infra*, pp. 405-406.
- 30) The Times, 12th November, 1965, p. 8 (c).
- 31) Ibid., p. 8 (e).
- 32) Ibid.
- 33) Ibid., p. 8 (f).
- 34) Ibid.
- 35) The Times, 13th November, 1965, p. 8 (c).
- 36) The Times, 16th November, 1965, p. 7 (e).
- 37) Ibid.
- 38) The Times, 12th November, 1965, p. 8 (c).

The Nigerian Federal Minister of State for Foreign Affairs expressed shock at U D.I.³⁹⁾ The Soviet Union's Izvestia described U.D.I. as a monstrous crime - within two hours!⁴⁰⁾ The Prime Minister of Jamaica also expressed shock.⁴¹⁾ The President of Pakistan said that Rhodesian action would have no validity whatsoever.⁴²⁾ The Prime Minister of Australia regretted the action.⁴³⁾ Turkey did not approve of U D.I.⁴⁴⁾ while Israel later affirmed its opposition to U.D.I.⁴⁵⁾ The West German Government regretted U.D.I. Its future course would be determined by its friendly relations with Britain, possible United Nations decisions and by Germany's belief in the principle of self-determination.⁴⁶⁾

The Portuguese attitude was originally ambivalent. The Foreign Minister stated that his government would consider whether or not to recognize Rhodesian independence only after studying the terms of the unilateral declaration.⁴⁷⁾ Later however Portuguese policy crystallized into a definite policy of non-recognition. The Prime Minister is reported as saying

"How could we be the only state to recognize the new Rhodesian Republic. Portugal recognizes the legal sovereignty of the British Crown." 48)

Though/...

39) Ibid.

40) Ibid., p. 8 (d).

41) Ibid., p. 8 (f).

42) Ibid.

43) Ibid.

44) Ibid. Australia later refused to recognize the Proclamation of the Rhodesian Republic. S/9853, Annex II, p.2.

45) The Times, 16th November, 1965, p.7 (e).

46) The Times, 12th November, 1965, p.8 (e). West Germany later refused to recognize the Republic of Rhodesia. S/9853, Annex II, p. 17.

47) The Times, 12th November, 1965, p. 8 (d).

48) Cape Times, 20th April, 1970.

Though Botswana only came into existence as an independent state after U.D.I., its attitude not to recognize Rhodesia is clear from the policy statement issued by its President Sir Seretse Kgama on 2nd March, 1970 in which he urged inter alia that all states, especially those in Southern Africa, should refrain from according recognition.⁴⁹⁾

We have now seen that no state has expressly recognized Rhodesia and that many states have even gone further by expressly declaring their non-recognition. It is now necessary to examine whether recognition of Rhodesian independence can be implied from the conduct of other states. There are two important principles to bear in mind in determining in any case whether recognition can be implied.

- (a) The intentions of the party whose conduct is subject to scrutiny is the paramount consideration in all types of implied recognition.⁵⁰⁾ It is important to bear this principle in mind constantly because many rules of thumb have developed indicating that recognition can be implied in certain circumstances and not in others.⁵¹⁾ These rules of thumb must be seen to be subject to the principles under discussion. This means that an individual rule of thumb must always give way in the face of a contrary intention. B.R. Bot describes this by saying that an overriding importance is attached to intention in/...

49) Die Burger, 3rd March, 1970.

50) Starke, p. 147; Lauterpacht, p. 371 says recognition is primarily and essentially a matter of intention while A.J.G.M. Sanders, "Die Erkenning van State en Regerings" (33) T.H.R.-H.R., 1970, p.259 at p. 264 describes intention as being "deurslaggewend".

51) For example the rule that the conclusion of a bilateral treaty implies recognition whereas participation in multilateral treaties does not as a rule imply recognition. See B.R.Bot, Nonrecognition and Treaty Relations, Leiden, 1968, p. 30. We shall shortly see many of these rules of thumb where they are relevant in the Rhodesian context.

in the matter of recognition.⁵²⁾ Lauterpacht says in relation to implied recognition:

"There is, as a rule, no conduct, however conclusive in ordinary circumstances, the normal legal consequences of which cannot be averted or interpreted by a clear manifestation of a contrary intention." ⁵³⁾

(b) Recognition will not be lightly implied.⁵⁴⁾ Indeed it has been stated that the implication is made solely when the circumstances unequivocally indicate an intention to establish formal relations with a new state or government as the case might be.⁵⁵⁾ We are only entitled to treat a particular act as amounting to recognition when there is no doubt as to the intention to recognize.⁵⁶⁾ It is therefore asserted that an act from which recognition is implied should be formal and official.⁵⁷⁾ It is possible however to have intensive and even official relations with a state without recognizing it.⁵⁸⁾ There are many acts which may safely be performed without any implication of recognition being drawn.⁵⁹⁾

We/...

52) Note 51) supra, p. 32.

53) P. 369.

54) Schwarzenberger, Manual, p. 71.

55) Starke, p. 147; Oppenheim, International Law, 8th Ed., I, pp. 146-148. Lauterpacht, pp. 395, 396 points out that particularly exacting evidence of recognition is required in the case of states which have declared themselves to be pursuing a policy of non-recognition and even more so if such states are bound by an obligation of non-recognition. As other states have expressly adopted such a policy in relation to Rhodesia and as members of the United Nations have an obligation in this respect under S. Res. 277 (1970) it would require very exacting evidence to imply recognition of Rhodesia.

56) Lauterpacht, p. 370.

57) Chen, p. 218.

58) Bot, note 51) supra, p. 255.

59) Examples are: giving relief to victims of disaster; informal calls on officials; informal diplomatic approaches; informal communications; conduct of routine matters; postal agreements; maintaining an agency; protesting because of an outrage and dealing with postal orders issued by the unrecognized entity. Whiteman, II, pp. 526, 529, 531, 532, 567, 577, 578, 595; Lauterpacht, pp. 388, 389, 393. For a description of other acts from which recognition is not normally implied see Oppenheim, International Law, 8th ed., I, pp. 146-148.

We have now seen the overall principles which govern implied recognition and we must now examine the more important categories of conduct of other states towards Rhodesia to see whether recognition can be implied from such conduct. Here it is proposed to deal with the following species of conduct: (a) maintenance of official relations with Rhodesia; (b) conduct of negotiations with Rhodesia; (c) maintenance of trade relations with Rhodesia; (d) maintenance of consular relations with Rhodesia; (e) maintenance of diplomatic relations with Rhodesia; (f) conclusion of bilateral treaties with Rhodesia; (g) United Nations action against Rhodesia under Chapter VI of the Charter; (h) United Nations action against Rhodesia under Chapter VII of the Charter; (i) United Kingdom submission of the Rhodesian question to the United Nations.

(a) Maintenance of official relations with Rhodesia.

It is possible to have intensive and even official relations with an entity without recognizing it. Relations officieuses i.e. official but informal relations do not carry the implication of recognition.⁶⁰⁾ Though these are usually restricted to matters of immediate concern, such as temporary security of property or persons, it is not uncommon for important commercial and even political matters to be dealt with in this informal manner.⁶¹⁾ Informal but official intercourse may be maintained through the appointment of agents in the territory in question.⁶²⁾

There/...

60) Bot, note 51) supra, p. 255; Chen, p.136.

61) Chen, pp. 216-217.

62) Chen, p. 217; Lauterpacht, p. 388. Thus for instance, the maintenance of a British "link" man in Salisbury for the purpose of keeping contacts between Britain and Rhodesia does not imply recognition. See Cape Argus, 26th May, 1972.

There are many other forms of official contact which may be maintained without implying recognition. For instance it would appear to be South African practice to endorse subpoenas issued in Rhodesia for service in South Africa.⁶³⁾ It would also appear to be South African practice to surrender criminals to Rhodesia.⁶⁴⁾ This does not imply recognition.⁶⁵⁾ It is common knowledge that South African and Portugal recognize passports issued by the Rhodesian government as valid travel documents. It is possible to imply recognition from this⁶⁶⁾ but it is submitted that such implication is rebutted by the clear policy statements issued by both South Africa and Portugal on the question of recognition of Rhodesia.⁶⁷⁾ It is also clear that no implication of recognition should be made from visits by officials in the absence of an intention to/...

63) S. v. Charalambous, 1970 (1) S A. 599 (T).

64) S. v. Eliasov, 1967 (2) S.A. 423 (T).

65) Chen, p. 218; Lauterpacht, p. 394.

66) Chen, p. 218 says that there is in fact a conflict on the question of whether or not recognition should be implied from the issue of travel visas by unrecognized authorities. A fortiori recognition would be implied from the issue of a passport and its recognition.

67) Even if the normal rule of thumb would imply recognition in such circumstances, this rule would, as pointed out, have to give way before the overriding principle that intention is paramount. In these cases intentions appear to be clear from the policy statements in question, as to which see supra, p. 341 and infra, pp.367-368. It is true that the Advisory Committee of the League of Nations Assembly was of the view that non-recognizing governments could not regard a document issued by authorities dependent on the Manchuko Government as a passport and could not therefore allow their consuls to visa such documents. The Committee considered that the consuls in question should issue identity documents to such persons. Lauterpacht, pp. 396-397 considers this to be an excessively ingenious precaution which does not take into account the situation where there is a proclaimed attitude or obligation of non-recognition which would make the implication of recognition impossible in any event in such a case. See too note 55) supra, and Daniel C. Turack, "Passports issued by some non-state entities" (43) B.Y.I.L., 1968-1969, p. 209 at p. 215 who says that though the United States does not recognize the Order of Malta it could accept passports issued by the latter as valid travel documents in terms of United States municipal law.

to recognize.⁶⁸⁾ Thus no implications should be drawn from the fact that the South African Prime Minister, Mr. Vorster, has visited Rhodesia⁶⁹⁾ or that the Rhodesian Prime Minister, Mr. Smith, has visited South Africa on several occasions.⁷⁰⁾

If the maintenance of official relations does not normally imply recognition, then a fortiori the mere fact that a former official happens to be still in a state, will not imply recognition. Thus Mr. Thomas Mann, the United States Under Secretary of State for Economic Affairs sent a letter to Mr. Henry Hooper, "the registered agent for the so-called Rhodesia Information Office in Washington", that the United States was not prepared to allow him to continue to live there "on the basis of a purported official capacity". The decision was communicated to the President of the United Nations Security Council because of a protest by the Nigerian representative that Mr. Hooper's continued activities in Washington was a breach of Security Council resolutions on non-recognition of Rhodesia. Mr. Mann stated that Mr. Hooper had come to the United States as a diplomatic agent attached to the British Embassy. Since U.D.I. he had ceased to be a member of the Embassy staff.⁷¹⁾ It is submitted that the Nigerian contention was incorrect here. No United States recognition could be implied in the circumstances, even if Mr. Hooper continued to live in the office and continued to carry out activities there.⁷²⁾

(b)/...

68) Whiteman, II, pp. 529, 531.

69) Die Burger, 29th May, 1970.

70) Cape Argus, 11th July, 1970; Die Burger, 28th September, 1970; Cape Times, 1st March, 1972.

71) The Times, 1st March, 1966, p. 11 (b).

72) As far as the allegation that recognition would be a breach of Security Council resolutions (assuming such recognition to exist of course), we may here refer to the fact that at the time there were no binding Security Council resolutions on this matter. See the writer (33) T.H.R.-H.R., 1970, p. 152 at pp. 159-163.

(b) Conduct of negotiations with Rhodesia.

At different stages since U.D.I. the United Kingdom has conducted negotiations with the representatives of the Government of Rhodesia. The main examples of these negotiations are the "Tiger" and "Fearless" talks and the Smith-Douglas-Home negotiations in 1971 destined to be successful initially but to be rejected later by the Pearce Commission which found them to be unacceptable to the Rhodesian Africans.⁷³⁾ It is a generally established rule of thumb in international law that the initiation and conduct of negotiations with an unrecognized entity does not necessarily imply recognition.⁷⁴⁾ If, of course, an intention to recognize can be implied from the conduct of negotiations, there may be recognition but otherwise not and of course it must be borne in mind that recognition will not lightly be implied. Obviously there has not been at any time an intention on the part of the United Kingdom to recognize Rhodesia. In the first place, recognition of Rhodesia would be incompatible with the claim to complete sovereignty over Rhodesia which the United Kingdom makes.⁷⁵⁾

In/...

- 73) The records of these negotiations will be found in Cmnd. 3171, Cmnd. 3793, Cmnd. 4065 and Cmd. R.R. 46- 1971. The report of the Pearce Commission is contained in Cmnd. 4964.
- 74) Schwarzenberger, Manual, p. 71; Starke, p. 147; Whiteman, I, pp.524, 580, 583, 584. Relations and meetings can take place without implications of recognition. See M. Lachs, "Recognition and Modern Methods of International Co-operation" (35) B.Y.I.L., 1959, p. 252 at p.253.
- 75) Supra, pp.335-338. The following instances may be noted. When Rhodesia proclaimed itself a Republic, the Foreign Secretary of the United Kingdom, Mr. Michael Stewart, urged the United States to close its Consulate in Salisbury. Die Burger, 6th March, 1970. The United States acceded to the request and withdrew its mission. Die Burger, 10th March, 1970. So too when the South African Prime Minister, Mr. John Vorster, announced his intention of visiting Rhodesia the British Embassy in Pretoria communicated with the South African government and expressed concern over the visit to British territory without communicating with the London Government. Die Burger, 23rd May, 1970.

In the second place, the United Kingdom has always specifically asserted its non-recognition of Rhodesia.⁷⁶⁾

(c) Maintenance of trade relations.

Certain nations, principally South Africa and Portugal, allowed normal trade relations with Rhodesia to continue after U.D.I.⁷⁷⁾ Indeed South Africa openly admits the maintenance of such trade relations with Rhodesia.⁷⁸⁾ This continues to be the position⁷⁹⁾ despite the imposition of United Nations mandatory economic sanctions against Rhodesia.⁸⁰⁾ The general rule of thumb here is that the conduct of business, the sending of trade missions and the conclusions of business agreements do not imply
recognition/...

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- 76) See text of the certificate submitted to the court in Madzimbamuto's case, note 21) supra. See too statement by the British Foreign Secretary that the reason why Britain was prepared to recognize the regimes in Czechoslovakia and Communist China but was not prepared to recognize Rhodesia was that the former entities were not in rebellion against the Crown. Die Burger, 16th May, 1970. See too A.J.G. Lang, "Madzimbamuto's and Baron's Case at First Instance" (5) Rhodesia L.J., 1965, p. 65 at pp. 72-73.
- 77) The Times, 21st December, 1965, p. 4 (a). The report contains a list of the countries who imported more than £1 million per annum from Rhodesia and points out that with the exceptions of South Africa, Portugal, Zambia and Malawi (the latter two being exceptional cases), these countries had banned sugar and tobacco imports and certain countries among them had also banned other imports.
- 78) The South African Prime Minister Dr. Verwoerd stated on 11th November, 1965 that South Africa would continue to maintain normal friendly relations with Rhodesia. The Cape Times, 12th November, 1965. On 28th February, 1966 he clarified his policy of maintaining "normal" trade relations with Rhodesia. The policy extended beyond trading in the usual commodities at the usual levels. In particular before the oil embargo only a limited amount of lubricant oils had been imported from South Africa. The Times, 2nd March, 1966, p. 11 (b).
- 79) See for instance the statement of Dr. Hilgard Muller, the South African Minister for Foreign Affairs, on 10th March, 1970 that South Africa's relations with Rhodesia would remain unchanged despite the decisions of other lands to close their consulates in Salisbury. He said: "Ons beleid is nog altyd goed verstaan en gewaardeer deur alle betrokkenes". Die Burger, 11th March, 1970. The South African Prime Minister, Mr. Vorster, stated that relations with Rhodesia would continue as in the past. Die Burger, 21st May, 1970.
- 80) S. Res. 232(1966) and S. Res. 253(1968). The legal implications of contravention of these are not relevant to the question under discussion viz. whether recognition can be implied from trading (whether or not in contravention of United Nations sanctions).

recognition.⁸¹⁾ Thus it would appear as if recognition of Rhodesia cannot be implied from the maintenance of normal trading relations. Moreover the trade relations comprise trading by private individuals and companies from South Africa. Such private acts cannot prejudice the attitude of the government on the question of recognition. It is for the government to recognize. But not even trading by the government itself with the Rhodesian government would necessarily imply recognition.⁸²⁾ The same arguments are applicable mutatis mutandis to Portuguese trading with Rhodesia or for that matter to the conduct of trade relations between Rhodesia and any other states.⁸³⁾ No implication of recognition can be drawn merely from the conduct of such trade relations. In any event the intentions of South Africa and Portugal not to recognize are quite clear⁸⁴⁾ and Rhodesia does not draw any inference of recognition from the maintenance of trade relations.⁸⁵⁾

(d) Maintenance of consular relations.

Since U.D.I. several states have maintained consular offices in Salisbury.⁸⁶⁾ These countries closed their missions in 1970 on the Proclamation of the Republic of Rhodesia.⁸⁷⁾

The/...

81) Chen, p. 218; Bot, note 51) supra, pp. 30, 31.

82) Chen, p. 218.

83) Thus the resumption of importation of chrome from Rhodesia into the United States does not imply recognition of Rhodesia. See Cape Argus, 5th April, 1972.

84) Supra, p. 341 ; infra, pp. 367-368.

85) Mr. Smith, the Rhodesian Prime Minister, stated that the pressure being exercised by the British Government was such that several countries who had afforded practical recognition and who were continuing to trade with Rhodesia, were not for the present able to give de iure recognition. See The Times, 19th February, 1966, p. 7 (a).

86) For the list of countries which maintained consular missions in Salisbury after U.D.I. see supra, p. 164.

87) For the history and order of such closures see supra, p. 164.

The general rule of thumb is that the maintenance of consular relations does not imply recognition in the absence of the issue of a consular exequatur.⁸⁸⁾ It is submitted that the maintenance of the consular relations in question does not imply recognition of Rhodesia for two reasons.

- (1) All the consular missions in question operated under the Queen's exequatur. It was by virtue of British permission that such missions were established and maintained in Rhodesia. They were not therefore accredited to the government of an independent Rhodesia and thus did not imply recognition of the latter. The missions in question were closed (on the Proclamation of the Rhodesian Republic) as a result of British pressure. Thus when the United Kingdom pointed out to the United States that its mission had been established with the approval of the British Government, the United States withdrew the mission.⁸⁹⁾ The Portuguese Consulate, the last mission to close in Salisbury, also operated under the Queen's exequatur. When the British Government threatened to withdraw the exequatur, the Portuguese decided to close the Consulate rather than clash directly with the United Kingdom on

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88) Starke, p. 147; Briggs, pp. 107, 116; Whiteman, II, pp. 569-570, 570-571, 584, 588; Oppenheim, International Law, 8th ed., I, p. 148; Bot, note 51) supra, p. 31. But Bot (p. 102) criticizes the exception which would imply recognition from the issue of a consular exequatur. He says it seems exaggerated to attribute so much significance to an act which only permits a foreign official to fulfill non-political functions and in addition it is no longer a necessary requirement for the full and unhampered exercise of consular functions. Further, it is difficult to conceive why the issue of an exequatur should have a greater impact than the visit of a Cabinet Minister of the unrecognized regime. Cf. the discussion supra, pp. 345-346 on the respective visits of the South African and Rhodesian Prime Ministers to each other's countries. For a discussion of the implications of the issue of exequaturs and the making of requests for same see Lauterpacht, pp. 383-387.

89) Die Burger, 6th March, 1970; 10th March, 1970.

the legal point.⁹⁰⁾

(11) The consular relations in question were merely the continuance of relations which existed before 1965 and as such they do not imply recognition of the new claim of Rhodesia to sovereign independence made in U.D.I.⁹¹⁾

(e) Maintenance of diplomatic relations.

South Africa has at all times since U.D.I. maintained a mission in Salisbury under the direction of an accredited diplomatic representative.⁹²⁾ Further the head of this mission is accredited to the Foreign Ministry of the Rhodesian Government.⁹³⁾ There is also a Rhodesian mission in South Africa under an accredited diplomatic representative.⁹⁴⁾ The general rule of thumb in international law is that the maintenance of diplomatic relations does imply recognition.⁹⁵⁾ It is submitted that the maintenance of such relations between South Africa and Rhodesia does not however imply recognition for the following reasons.

(1) The missions in question could possibly fall short of
_____ diplomatic/...

90) Cape Times, 20th April, 1970; Sunday Times, (Johannesburg), 26th April, 1970; Die Burger, 27th April, 1970.

91) Informal intercourse may be maintained through the retention of consular offices of the non-recognizing state in the territory of the new entity. Chen, p. 217.

92) Die Burger, 11th March, 1970; Die Burger, 22nd May, 1970.

93) Cape Times, 2nd May, 1970.

94) Palley, p. 725.

95) Starke, p. 147; Oppenheim, International Law, 8th ed., I, p. 148.

diplomatic relations in the full sense.⁹⁶⁾ Chen points out that the mere fact that an agent is styled 'diplomatic' does not affect the question of recognition if the intercourse remains at an unofficial or informal level.⁹⁷⁾

- (ii) The diplomatic relations in question existed before U.D.I. When Southern Rhodesia and South Africa were both members of the Commonwealth, they exchanged High Commissioners.⁹⁸⁾ When South Africa left the Commonwealth an accredited diplomatic representative was appointed.⁹⁹⁾ The maintenance of such relations at the relevant time could not possibly have amounted to recognition of Southern Rhodesia as an independent state for the obvious reason that Southern Rhodesia did not then claim to be an independent state. Since the maintenance of such relations did not imply recognition in the pre-U.D.I. era, it is submitted that the maintenance of the same relations in the post-U.D.I./...

96) See for instance the British attitude to the missions stated by the Foreign Secretary on 4th May, 1970. He stated that it was incorrect to regard the contact between South Africa and Rhodesia as diplomatic relations and that the South African representative in Rhodesia was described in a manner which stressed that he was not really a diplomatic representative. Die Burger, 6th May, 1970. On the Rhodesian Mission the attitude was that it had no legal status and H.M. representatives abroad had been instructed not to have dealings or social contacts with it. The Times, 10th December, 1965, p. 18 (d). It is conceded of course that the mere attitude of H.M. Government that relations with Rhodesia were "illegal" or "non-existent" does not necessarily mean that such relations do not exist as a matter of international law.

97) P. 217.

98) J.E.S. Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965-1966, p. 103 at p. 106.

99) Palley, p. 725 quotes Mr. Bottomley, the Commonwealth Secretary, as saying that the appointment of such a representative to South Africa was no precedent. It had historical reasons in that Southern Rhodesia was represented in South Africa when the latter was a member of the Commonwealth. When South Africa left, Britain felt it was unnecessary to make any change in the situation.

U.D.I. era does not imply recognition of Rhodesia as an independent state. The mere continuance of an existing relationship does not imply recognition of a new claim by one of the parties.¹⁰⁰⁾

(iii) The South African intention in relation to non-recognition of Rhodesian independence is in any event abundantly clear¹⁰¹⁾ so there is simply no room left for an implication of recognition from the maintenance of such diplomatic relations.¹⁰²⁾

Finally it may be mentioned that the Rhodesians maintain a mission in Lisbon. This is however, not a diplomatic mission and this fact is quite clear from the attempt made in July, 1965 to appoint a Rhodesian representative having independent diplomatic status. The attempt failed, Portugal being unwilling to go beyond entitling the mission a "Rhodesian Mission".¹⁰³⁾ It is submitted that the mission in question amounts merely to the appointment of a Rhodesian agent in Lisbon on an informal basis and such an appointment does not imply recognition.¹⁰⁴⁾

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100) Chen, p. 217 says that the retention of the diplomatic officers of the non-recognizing state in the territory of the new entity does not imply recognition. He would also regard such continuing relations as being of an informal nature.

101) Infra, pp. 367-368.

102) Sanders, note 50) supra, p. 264.

103) Fawcett, note 98) supra, p. 106; Palley, pp. 725-726. The latter aptly comments that Portugal received the representative but not in the capacity claimed. See too statement of Mr. George Thompson that the Rhodesian mission in Lisbon had no official status whatsoever and that H.M. representatives abroad had been instructed not to have dealings or social contacts with it. The Times, 10th December, 1965, p. 18 (d). The United Kingdom attitude however would not prevent the mission being a diplomatic one. But the Portuguese attitude, as host to the mission, would be decisive.

104) Chen, p. 217.

(f) Possible conclusion of bilateral treaties with Rhodesia.

Prof. C.J R. Dugard drew attention to the fact that South African police are present in Rhodesia and that presumably their presence arises from a bi-lateral agreement between the governments of South Africa and Rhodesia. He then posed the question whether recognition of Rhodesia by South Africa could be implied from such an agreement.¹⁰⁵⁾

Whenever a state concludes an agreement with an unrecognized entity there are, it is submitted, four possibilities.

- (1) The state intends to conclude a treaty and to recognize the other party fully. Here there will be an intention on both sides to create international obligations, so that there is a treaty, and in addition there will be a unilateral intention to recognize on the part of the "old" state. In principle full de iure recognition will normally be implied from the conclusion of a bilateral treaty unless there appears to be a contrary intention.¹⁰⁶⁾ The writer previously submitted that such recognition could be implied at the conclusion of the treaty.¹⁰⁷⁾ It could however be that such recognition might in some circumstances precede the conclusion of the treaty, e.g. the offer of treaty relations to an unrecognized entity might imply
recognition/...

105) (86) S.A.L.J., 1969, p. 112 at pp. 113-114.

106) Oppenheim, International Law, 8th ed.I, pp.146-148; Starke, p.147; Lachs, note 74) supra, p. 253; Bot, note 51) supra, p. 30. However, participation in a multilateral treaty does not normally carry the implication of recognition. Ibid. For the possible implications of participation in a multilateral treaty with a non-recognized entity see Lachs, note 74) supra, pp. 256-257. See supra, pp. 183-185.

107) "Does South Africa Recognize Rhodesian Independence?" (86) S.A.L.J., 1969, p. 438.

recognition though the treaty itself only comes into operation at a later stage when the offer is accepted¹⁰⁸⁾ and an unratified treaty might also imply recognition.¹⁰⁹⁾ The requirement of intention would, as always, be necessary in such cases. In all cases where recognition is implied from a treaty with an unrecognized entity, the recognition afforded is essentially unilateral¹¹⁰⁾ though it is inseparably interwoven with a bilateral treaty. Here the treaty fulfils a dual function.¹¹¹⁾ Its two distinct roles rest upon two distinct bases - the intention to recognize and the intention to create international law obligations.

The above rule of thumb relating to implied recognition from the conclusion of a bilateral treaty is subject to the general principle requiring an intention to recognize.

Very often there will be no intention to recognize in non-political treaties which are of a temporary or technical nature/...

108) Sanders, note 50) supra, p.264.

109) Lachs, note 74) supra, p. 253.

110) On the unilateral nature of recognition see supra, p.281.

111) Lauterpacht, pp. 56-57 points out that it is not difficult to regard a given treaty as fulfilling two purposes at the same time, viz. recording the unilateral act of recognition of the new state which thereupon takes part in a contractual relationship and cites as examples the 18th century Treaty of Peace between Britain and the United States and the 19th century Treaty in terms of which Portugal recognized the Brazilian Empire. In all cases recognition is independent of the content of the treaty and should the treaty lapse recognition would remain. A. Raestad, "La Reconnaissance internationale des nouveaux états et des nouveaux gouvernements" (17) Revue de Droit International et de Legislation Comparée, 1936 p.257 at pp. 273-274 says that when a mother country concludes a treaty giving independence to a colony it fulfils a dual function:

"Il y a, d'une part, la reconnaissance et d'autre part, le règlement plus général auquel la déclaration de reconnaissance est incorporée ... Quelle que soit la forme employée ... la reconnaissance se présente, quand au fond comme un acte unilatéral."

nature such as trade agreements or those for limited purposes.¹¹²⁾ But even the conclusion of a political treaty is not necessarily prejudicial to recognition where there is no intention to recognize.¹¹³⁾ O'Connell says:

"One might even say that agreements could be entered into with Eastern Germany without involving recognition, at least provided they were not intended as a general and permanent settlement of the political situation taken account of in western non-recognition policy." 114)

Lacks points out that in the course of time starting from the nineteen twenties an ever-growing number of bilateral treaties have been concluded between states which do not recognize one another.¹¹⁵⁾

When an agreement is concluded from which it is impossible to imply full de iure recognition because the intention not to recognize is clear, the agreement in question may fall within any one of the three remaining categories.

Which of these it is will depend on the relevant intentions in the case under scrutiny.

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112) Bot, note 51) supra, p. 30; Starke, p. 147.

113) Bot, note 51) supra, p. 30.

114) I, p. 155. Thus Belgium, the United States and the West Berlin City Council (supervised by West Germany) all concluded agreements with East Germany without implication of recognition of the latter. See Bot, note 51) supra, pp. 96-98.

115) Lachs, note 74) supra, p. 253. An instance is the Exchange of Notes between the United States and Albania at Tirana on June 23rd and 25th, 1922 prior to, and as a condition of United States recognition of Albania on July 28th, 1922. See Herbert W. Briggs, "Recognition of States: Some Reflections on Doctrine and Practice" (63) A.J.I.L., 1949, p. 113 at p. 118. Some earlier examples from the 16th and 17th centuries are cited by Jochen A. Frowein, "Transfer or Recognition of Sovereignty - Some early Problems in connection with Dependent Territories" (65) A.J.I.L., 1971, p. 568 at pp. 568-570.

(ii) The state intends to conclude a treaty with the entity hitherto unrecognized and in addition to afford a limited degree of recognition to the latter.¹¹⁶⁾ Here there will be an intention on both sides to create international law obligations and so there is a treaty. There will also be an intention to recognize for some of the purposes of international law but not for all purposes. The obvious example would be recognition for the purposes of bearing rights and duties under the treaty in question and no more.¹¹⁷⁾ Here to rebut the implication of full de iure recognition, which would normally flow from the conclusion of such a treaty, the state in question should clarify its intention not to afford full recognition. In practice such limited recognition under a bilateral treaty is unlikely.¹¹⁸⁾

(iii) The entities in question may intend to conclude a municipal law agreement only. Here there is no intention to create international law obligations. There is a municipal law contract but no treaty. Hence there cannot be any implication of recognition.

(iv) The entities in question may not intend to create any obligations at all - either in international or in
_____municipal/...

116) On limited recognition see supra, pp.197-201.

117) Lachs, note 74) supra, p. 258 says that the conclusion of a treaty with an unrecognized entity amounts only to an admission of the treaty-making capacity of the other party or recognition for the purposes of the treaty.

118) It is much more likely to occur in the case of multilateral treaties. See supra, pp.183-185. The Albanian example in note 115) supra, is probably an instance of limited recognition in a bilateral treaty.

municipal law. Here we merely have a "gentleman's agreement". There is no contract and no treaty. Hence there cannot be any implication of recognition here.¹¹⁹⁾

We have now seen the various categories of agreement which may exist and it remains to assess the possible bilateral agreement with Rhodesia in the light of these categories.

The overall question which arises is whether the agreement in question is a treaty. For if it is not, no recognition (either full or limited) can be implied from it.

The present writer examined this question at some length in a previous paper.¹²⁰⁾ The question of course depends primarily on the intentions of the parties to the agreement. If they intended to create international law relations by means of the agreement, it is a treaty and there is recognition.¹²¹⁾ The writer/...

119) Inter-departmental agreements for instance are normally not treaties and do not bind the state because they are usually concluded by organs which are not regarded as being competent to bind the state in international law. It is only if there is an international practice recognizing an administrative competence to bind the state, that inter-departmental agreements will become legally binding. In a restricted class of international business including river drainage, canals, telegraphs, posts and railways there is a tendency to regard such practice as established. See J. Mervyn Jones, "International agreements - other than 'Inter-State Treaties' - Modern Developments" (21) B.Y.I.L., 1944, p. 111 at pp. 117, 119. Cf. Vienna Convention on the Law of Treaties, 1969, Article 7 (1) (b).

120) Note 107) supra, pp. 438-443.

121) Either full or limited. For discussion of the 'intent' requirement see ibid., pp. 439-440. J.E.S. Fawcett, "The Legal Character of International Agreements" (30) B.Y.I.L., 1953, p. 381 at pp. 387-390, 400 says that the contractual character of international agreements depends upon the intention of the parties to create legal relations between them. There are a number of factors which indicate the presence of such intentions. Two of these factors are decisive and the remainder, while indicative of such intentions, are not conclusive. The decisive factors are: (i) whether the parties have declared, or it is deduced from the agreement as a whole, that it is to be governed by one of the three bodies of law to which the parties are capable of referring the agreement (these are international law and the respective municipal law systems of the parties); (ii) whether the parties have provided for the settlement of disputes arising from the agreement by compulsory judicial process. The inconclusive but relevant factors are:

(i) registration of the agreement under Article 102 of the Charter of the United Nations;
(ii) the subject matter of an agreement may lead to the inference of such an intention, e.g. when the agreement is the constituent instrument of an international organisation.

writer came to the conclusion on such evidence as was available that the parties in concluding this agreement did not intend to internationalize their relations.¹²²⁾ His principal reasons were as follows:¹²³⁾

- (i) Non-registration of the agreement by South Africa in accordance with Article 102 of the Charter of the United Nations would indicate that South Africa probably did not intend to conclude a treaty with Rhodesia.¹²⁴⁾
- (ii) Recognition need not inevitably be implied from the conclusion of bilateral agreements. There is nothing to prevent even recognized states from concluding 'gentleman's agreements' which are not treaties and from which no rights and duties in international law flow.¹²⁵⁾
- (iii) The agreement was concluded in 1967 and yet Rhodesia does not claim recognition. In this respect reference was made to the declaration against self interest made by the Rhodesian Prime Minister on 25th June, 1969.¹²⁶⁾
- (iv) Reference was made to the clear-cut policy statement made by the South African Prime Minister that South Africa was not/...

122) The writer, note 107) *supra*, p.443.

123) For amplification of these arguments see *ibid.*, pp. 441-443.

124) *Ibid.*, p.441. Failure to register a treaty would be a breach of obligation under Article 102 of the Charter. R.B.Lillich, "The Obligation to Register Treaties and International Agreements with the United Nations" (65) *A.J.I.L.*, 1971, p. 771 at p. 772. It would not be presumed that South Africa intended to commit a breach of obligation in view of the presumption in favour of the law-abidingness of states. Schwarzenberger, I, p. 647. However the test of registration is not conclusive on intention. Fawcett, note 121) *supra*, p.389 (who gives the reasons for this at pp. 389-390).

125) The writer, note 107) *supra*, p. 443.

126) *Ibid.*, pp. 441-442.

not according recognition to Rhodesia's claim to independence. This statement amounted to the employment of the specific device of reservation of rights and its purpose was to refute any suggestion of implied recognition. Taken in conjunction with the rule that recognition is not lightly to be implied, this statement must be taken to mean that South Africa's intention was not to recognize Rhodesia.¹²⁷⁾

To the above arguments the following may now be added as further evidence that no implied recognition of Rhodesia by South Africa has taken place.

- (i) Further declarations against self-interest have been made by the Rhodesian Prime Minister.¹²⁸⁾
- (ii) South Africa has since made it quite clear that it does not intend to recognize Rhodesia.¹²⁹⁾

In the light of all that has been said it would appear to be quite clear that no recognition of Rhodesia either full or limited, can be implied from the conclusion of the aforesaid bilateral agreement between that state and South Africa.

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127) Ibid., p. 442. See infra, p. 367.

128) On 13th April, 1970, Mr. Smith described the achievement of recognition as one of Rhodesia's important aims and that Rhodesia should work in that direction. See Die Burger, 14th April, 1970. In the Cape Times, 20th April, 1970, he is reported as saying "Why all this fuss about recognition? What is more important is to continue winning the economic war. Recognition will come later".

129) On 3rd March, 1970 the South African Prime Minister, Mr. Vorster, confirmed that relations with Rhodesia would be as in the past. On 20th May, 1970, the British Foreign Secretary stated that South Africa had given the assurance that the impending visit of Mr. Vorster to Rhodesia did not indicate a move towards recognition of the independence of the territory. See Die Burger, 21st May, 1970; 23rd May, 1970.

(g) United Nations action against Rhodesia under Chapter VI of the Charter

Reference has been made to the resolution of the Security Council of the United Nations imposing selective mandatory sanctions on Rhodesia in December 1966.¹³⁰⁾ The resolution was said to be taken under Chapter VII of the Charter¹³¹⁾ but it has been hypothetically argued that if it had been taken under Chapter VI of the Charter, viz. that dealing with "Pacific Settlement of Disputes" it would be tantamount to recognition of Rhodesia because you cannot have a non-existent party to a dispute¹³²⁾

With respect, it is submitted that this contention is not correct for the following reasons:

- (i) It is true that one cannot have a dispute with a non-existent entity. It is also probable that the disputes referred to in Chapter VI of the Charter are disputes between states¹³³⁾ But there is no reason to assume that a dispute between a recognized state and an unrecognized one cannot be a dispute within the meaning of Chapter VI. In this case, as the unrecognized state is not an international person, the dispute cannot be an international law dispute. The submission then is that "disputes" within the meaning of Chapter VI are not necessarily confined

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130) S Res 232 (1966)

131) It undoubtedly was taken under Chapter VII. See discussion in John Hopkins "International Law - Southern Rhodesia - United Nations - Security Council", Cambridge Law Journal, 1967. p.1 at p 3

132) Editorial. (5) Rhodesia L J 1965 p 51

133) H Kelsen. The Law of the United Nations. London, 1951, p. 388

to international law disputes. "Disputes" under Chapter VI would of course include all international law disputes between states but would be wider in scope than this. This submission receives some support from the provision of Article 36(3) of the Charter which provides:

"In making recommendations...the Security Council should also take into consideration that legal disputes...should... be referred ...to the International Court of Justice...."

The fact that legal (i.e. international law) disputes are singled out for special treatment in this article means it is submitted that the Chapter envisages that disputes may be either legal or non-legal.

The net effect of Security Council recommendations in relation to a dispute with a non-recognized state would be that the Security Council recognizes the state as such in the "acknowledging" sense¹³⁴⁾ of the term but there would be no implication of legal recognition.

(11) There need not even be a dispute (either legal or otherwise) for the Security Council to act under Chapter VI. Article 34 provides:

"The Security Council may investigate...any situation which might lead to international friction or give rise to a dispute...."

Article 36(1) provides:

"The Security Council may, at any stage of...a situation... recommend appropriate procedures or methods of adjustment".

It is clear that a dispute is not necessary. The existence of a "situation" enables the Council to act under Article 36(1)¹³⁵⁾ Here there could not even be recognition in the "acknowledging" sense and a fortiori no legal recognition of an unrecognized state involved in such a "situation".

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134) On these two types of recognition see discussion *supra*, pp. 269-270. As we have seen recognition in the "acknowledging" sense has no legal implications though it is probably evidence in favour of the existence of the objective criteria of statehood in the "acknowledged" (but legally unrecognized) entity.

135) See Kelsen, note 133) *supra*, pp. 388-389.

The conclusion then is that recommendations made by the Security Council under Chapter VI of the Charter in relation to Rhodesia cannot amount to recognition of the latter.¹³⁶⁾

(h) United Nations action against Rhodesia under Chapter VII of the Charter.

The Security Council has instituted mandatory sanctions of various kinds against Rhodesia.¹³⁷⁾ It has been suggested that the imposition of sanctions against an entity amounts to implied recognition that it is de facto in power.¹³⁸⁾ This can at most amount to recognition in the "acknowledging" sense and cannot amount to legal recognition (either de iure or de facto).¹³⁹⁾

(i) United Kingdom submission of the question to the United Nations and invocation of United Nations assistance.¹⁴⁰⁾

It has been alleged by Mr. Smith, the Rhodesian Prime Minister, that this is tantamount to recognition of Rhodesian independence by the United Kingdom.¹⁴¹⁾ It is submitted that this contention

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135) See Kelsen, note 133) supra, pp. 388-389.

136) Even were it to amount to recognition, it is submitted that it would only do so in the case of those states which voted for it in the Security Council. These would of course not exceed fifteen in number and might be as few as nine. See Articles 23, 27 of the Charter.

137) The principal resolutions are S. Res. 221 (1966); 232 (1966); 253 (1968); 277 (1970).

138) H.R.Hahlo, "The Privy Council and the 'Gentle Revolution'" (86) S.A.L.J., 1969, p. 419 at p. 432.

139) On the distinction between legal recognition and "acknowledging" recognition, de iure recognition and de facto recognition (both in fact species of legal recognition) see supra, pp. 269-270, 279-280. See too, footnote 134) supra, and 142) infra.

140) For descriptions of the debate in the British House of Commons which preceded such introduction and the speech of the Foreign Secretary, Mr. Michael Stewart when introducing the matter to the Security Council see Chayes, II, pp. 1338-1342.

141) Rosalyn Higgins, "International Law, Rhodesia and the United Nations" (23) The World Today, 1967, p. 94 at p. 105. It is interesting to note that France seemed to take the same view of the matter at the time. See speech of the French Delegate to the Security Council at 20 U.N.S.C.O.R., 1258th meeting 3 (1965).

is not correct for the following reasons:

(i) Article 39 of the Charter provides:

"The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".

Articles 41 and 42 describe the various sanctions which might be imposed by the Council.

Higgins points out, and with respect correctly, that Article 39 can be invoked in respect of non-sovereign entities. One cannot therefore assume that an entity is a sovereign state because sanctions are imposed under Article 39.¹⁴²⁾

(ii) Implied recognition does not arise lightly and is essentially a matter of intention.¹⁴³⁾ As we have seen the United Kingdom intention not to recognize Rhodesian independence is, in any event, quite clear.¹⁴⁴⁾

(iii) There is nothing to prevent a state from bringing one of its domestic problems before the United Nations for solution.¹⁴⁵⁾ There is therefore nothing to prevent the

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142) Note 141) supra, p. 105. The extensiveness of the operation of Article 39 can be better appreciated by saying that it can be invoked against any entity including not only states (both sovereign and non-sovereign, both recognized and non-recognized) but also entities which are not states, e.g. organizations, companies, individuals.

143) Higgins, note 141) supra, p. 105.

144) Supra, p. 139.

145) Higgins, note 141) supra, p. 96 aptly says in relation to Rhodesia: "... if the constitutional authority wishes to put matters before the international community, matters which are otherwise within its jurisdiction, nothing prevents it from doing so."

United Kingdom from requesting United Nations assistance in helping it to quell the rebellion in Rhodesia. Such request and assistance does not imply recognition of the secessionary entity.¹⁴⁶⁾

In view of all that we have said, it is now submitted that no other state recognizes Rhodesian independence either expressly or impliedly.

(2) Recognition of the British claim to complete sovereignty over Rhodesia.

As we have seen the British claim is an international law claim to exercise complete sovereignty over Rhodesia. It would appear as if this claim is recognized by practically every other state. That this is so is apparent from the conduct of the overwhelming majority of states both within the framework of the United Nations organization and outside that organization.

Various resolutions on Rhodesia have been passed by overwhelming majorities in the General Assembly of the United Nations and these resolutions constantly refer to the United Kingdom as the "administering power".¹⁴⁷⁾ The conduct of those states which voted for

such/...

146) Though the request for assistance from the United Nations and the rendering of such assistance by the latter in the form of sanctions do not prejudice the United Kingdom in implying recognition of Rhodesia, they do weaken its position in relation to recognition of Rhodesia by other states. This matter was previously discussed by the writer in "Status of Rhodesia in International Law", Acta Juridica, 1967, p. 39 at p. 46 and "Rhodesia; a Duty not to Recognize?" (33) T.H.R.-H.R., 1970, p. 152 at pp. 154-155. The internationalization of the situation by the invocation of United Nations aid shows an inability to control a domestic issue which other subjects of international law might take into consideration in deciding whether or not to grant recognition to Rhodesia. The fact that the United Kingdom needed the co-operation of other states to help restore its rule in Rhodesia would indicate that recognition of the latter would not be premature.

147) A. Res. 2024 (XX); A. Res. 2151 (XXI); A. Res. 2383 (XXIII). Further S. Res. 216 (1965) and S. Res. 217 (1965) recognize the authority of the Government and Parliament of the United Kingdom alone. See Fawcett, note 98) supra, p. 114. When occasion demands, the law can recognize an abstract title presently divorced from a material display of sovereignty. See R. Y. Jennings, The Acquisition of Territory in International Law, Manchester, 1963, p. 5.

such resolutions is only consistent with a complete refusal to recognize Rhodesia and a complete recognition of the claims of the United Kingdom. There is also conduct performed outside the United Nations which indicates such an attitude on the part of several states.

Thus in the case of the United States, Ambassador William B. Buffum acknowledged the sovereign authority of the United Kingdom to reprieve condemned prisoners and generally to enter into consultations with Rhodesia for a settlement. The acknowledgement was made to the Security Council of the United Nations.¹⁴⁸⁾ When Rhodesia became a republic, the United States stated that it acknowledged the legal sovereignty of Britain and it acceded to a British request to withdraw its mission in Salisbury.¹⁴⁹⁾ The attitude of the judiciary in Shyu Jeng Shyong v. Esperdy reflects this position too. Judge Ryan said:

"...the United States recognizes the United Kingdom as the legitimate government for Rhodesia; that the United States consular office in Rhodesia is accredited to the United Kingdom; and that the United States recognizes only United Kingdom passports and visas for travel to Rhodesia." 150)

The Portuguese Prime Minister is also reported as saying:

"How could we be the only state to recognize the new Rhodesian Republic. Portugal recognizes the legal sovereignty of the British Crown". 151)

The Zambian President Dr. Kaunda is also reported as saying that Zambia is entitled to call on Britain to restore the peace in Rhodesia since Zambia still regarded Rhodesia as a British colony.¹⁵²⁾

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148) See "Contemporary Practice of the United States" (62) A.J.I.L., 1968, p. 754 at pp. 757-758.

149) Die Burger, 10th March, 1970.

150) 294. F. Supp. 355 at 356. See (63) A.J.I.L., 1969, pp. 828-829.

151) Cape Times, 20th April, 1970.

152) Die Burger, 24th June, 1970.

(3) Other attitudes to recognition.

We have just seen how states in general recognize the international claims of the United Kingdom to Rhodesia and refuse to recognize the Rhodesian claim to independence. We must now examine a few exceptional cases, and the first and main attitude which arises for discussion is that of South Africa. It is helpful here to examine the terms of various policy statements made by members of the South African Government on the South African attitude to recognition.

Immediately after the Unilateral Declaration of Independence

Dr. Verwoerd, then Prime Minister, stated

"The Republic will continue its policy of non-intervention. In accordance with this attitude which it has adopted in the course of the dispute both prior to and subsequent to Rhodesia's declaration of independence, it will express no views on the arguments put forward by either Britain or Rhodesia in this matter. The Republic will however continue to maintain the normal friendly relations with both countries.¹⁵³⁾

On 25th January, 1966, Dr. Verwoerd, reacting to a suggestion by the leader of the Opposition, Sir de Villiers Graaff that South Africa should recognize Rhodesia de facto, stated that South Africa would continue its policy of non-intervention and the maintenance of correct relations with both Britain and Rhodesia.¹⁵⁴⁾

At a meeting at Muizenberg on 3rd March, 1970, the South African Prime Minister, Mr. Vorster, confirmed that South African relations with Rhodesia would be as in the past.¹⁵⁵⁾ When he announced his intention of visiting Rhodesia, the British Embassy in Pretoria

made/...

153) Cape Times, 12th November, 1965.

154) The Times, 26th January, 1966, p. 10(b).

155) Die Burger, 21st May, 1970.

made enquiries and as a result was informed by the Department of External Affairs that his visit did not in any way imply recognition of Rhodesian independence and that South Africa's policy remained unchanged.¹⁵⁶⁾ When leaving Malawi on 21st May, 1970, Mr. Vorster stated at a Press Conference at Chilaka airport that the South African Government was not considering recognizing Rhodesia's independence.¹⁵⁷⁾ When the findings of the Pearce Commission were published on 23rd May, 1972,¹⁵⁸⁾ Mr. Vorster stated:

"The Pearce Commission's Report does not in any way change South Africa's relations with and attitude towards Rhodesia and its Government." ¹⁵⁹⁾

There is one certain thread which runs through all the above policy statements and that is that the South African attitude has remained unchanged since U D.I. It is therefore appropriate to take Dr. Verwoerd's initial statement of 12th November, 1965, as representing South African policy and to ascertain the South African attitude to the Rhodesian question from its terms.

It is submitted with some confidence, that the statement shows it was not the South African intention to recognize either British or Rhodesian claims in the matter. The conclusion therefore is that just as South Africa does not recognize Rhodesian independence so too it refuses to recognize British claims to exercise complete and exclusive sovereignty over Rhodesia. Another factor which supports this conclusion is South Africa's consistent policy of voting/...

156) Ibid. See too Sanders, Note 50 supra, p. 263.

157) Ibid.

158) Cmnd. 4964.

159) Cape Times, 24th May, 1972.

voting against various resolutions on Rhodesia introduced into the General Assembly of the United Nations which refer to the United Kingdom as the administering power and which emphasise its responsibilities.¹⁶⁰⁾ Since South Africa does not recognize any of the claims made we must now ascertain what its precise attitude is. There appears to be two possibilities.

(a) South Africa does not recognize any international law claims to the territory known as Rhodesia. This would appear to be an entirely unsatisfactory solution. Such an attitude would be unlikely for the following reasons.

(i) There are competing claims to international law sovereignty over the territory. The international law claim of the United Kingdom is a very strong one being recognized by practically every other state, while that of Rhodesia is weak since Rhodesian independence has not been recognized by any state, including South Africa. A denial of all recognition in the face of such complete claims would therefore appear to be very unlikely.

(ii) It is desirable that there should be an authority which is responsible for each piece of territory in international law.¹⁶¹⁾

(iii) A complete absence of recognition could be tantamount to regarding the territory as a res nullius. But there are grave difficulties in the way of such a status because of/...

160) A. Res. 2024 (XX); A. Res. 2379 (XXIII) ; A. Res. 2383 (XXIII).

161) Schwarzenberger, Manual, p. 56 says: "What matters to other subjects of international law is the existence of a body politic which can be held directly responsible under international law in respect of a given territory, whether under a treaty or in tort."

of the fact that there are claims to exercise international law sovereignty over it.¹⁶²⁾ A total denial of conflicting claims to the territory would only be likely where a state with such an attitude asserts a relative title of its own or of some third state in opposition to the relative titles which it refuses to recognize.¹⁶³⁾ This is certainly not the position relating to Rhodesia. South Africa makes no claim to Rhodesia and does not purport to recognize the claim of any third state to the territory.

It is therefore unlikely that South Africa denies all recognition in respect of Rhodesia.

- (b) The second possibility is that South Africa continues to recognize the international law position as it was prior to 11th November, 1965 i.e. the status quo ante independence. In principle it would appear from the above mentioned statements of policy that South Africa is not prepared to recognize any claims made on or after 11th November, 1965.¹⁶⁴⁾ But South Africa has not stated that it was withdrawing any recognition previously accorded in respect of Rhodesia. In order then to escape from a complete personality vacuum in respect of the territory, it is submitted that the only possible

interpretation/...

162) Brownlie, p. 485 says that territory inhabited by peoples not organized as a state cannot be regarded as terra nullius. A fortiori it is submitted that territory occupied by people organized as a state, as in the case of Rhodesia, cannot be regarded as terra nullius. Further difficulties would present themselves in relation to the question of dereliction of sovereignty and the presumption against reversion to the status of a res nullius as to which see O'Connell, I, p. 444.

163) Schwarzenberger, I, p. 294.

164) Dr. Verwoerd's statement of 12th November, 1965 says that South Africa will express no views on the arguments put forward by either Britain or Rhodesia.

interpretation of the South African attitude is that it continues to regard the international law position of Rhodesia immediately before the Unilateral Declaration of Independence as being the presently effective position.¹⁶⁵⁾ We previously examined the pre-independence international law personality of Rhodesia¹⁶⁶⁾ and we found that a number of factors were indicative of a limited international personality conceded by the mother-state, the United Kingdom, to Rhodesia, e.g. Rhodesia was a member of several international organizations and was allowed to conclude treaties with third states. Limited personality therefore undoubtedly existed in several respects, with primary personality in the United Kingdom.¹⁶⁷⁾ This pre-1965 international law status now becomes very important if we accept the argument that South Africa still continues to recognize the status quo ante independence for it means that South Africa still continues to recognize a limited personality/...

165) This may be deduced from the statement of Dr. Verwoerd in which he refers to the maintenance of the South African attitude adopted in the course of the dispute both prior to and subsequent to Rhodesia's declaration of independence and the continuance of normal friendly relations with both Rhodesia and Britain. The practice of maintaining the same diplomatic and consular relations with Rhodesia which existed before U.D.I. and the continued application of pre-U.D.I. treaties (S. v. Eliasov, 1967 (2) S.A. 423 (T)) support this contention as does the attitude of the court in S. v. Charalambous, 1970 (1) S.A. 599 (T). The latter case revolved around section 7 (3) of the Foreign Courts Evidence Act, No. 80 of 1962 which requires a person subpoenaed by a foreign court of a territory mentioned in the Second Schedule to the Act to attend such foreign court under pain of committing an offence. The court did not consider the point that the Rhodesian subpoena in this case emanated from the courts of an unrecognized state. It would appear that by omission the courts (and the authorities) simply treated Rhodesia as being the same as the "Southern Rhodesia" mentioned in the Second Schedule to the Act, which, at the time of the passing of the Act, was professedly a British colony. The implication is that there is no change in the South African attitude to Rhodesia.

166) Supra, pp.89-90.

167) That personality can be so divided - a division by function - is apparent from our discussion ibid. See too Le Normand, pp.71-72, 74.

personality in Rhodesia as a dependency and that personality would be co-extensive with the pre-1965 personality of Rhodesia.

South Africa therefore recognizes the claims of both Rhodesia and Britain but only as they were prior to 11th November, 1965. It refuses to pass judgement or to give validity to, claims made by either entity after that date. This is in fact the way in which South Africa endeavours to maintain what it calls an attitude of neutrality in the dispute between Rhodesia and the United Kingdom.

It may now be asked whether the South African exercise of recognition is here a proper one. On the one hand the United Kingdom claims full sovereignty, on the other hand, Rhodesia claims full independence. The question which arises is whether South Africa has the option of recognizing something else - a midway course between the two claims - a continued recognition of the status quo as it was before the conflicting claims were made - a policy of recognition which is incompatible with both of the claims. It is submitted that South Africa can pursue such a via media in relation to recognition. The granting of recognition is a completely discretionary matter. There is therefore no duty to recognize any claim made.¹⁶⁸⁾ As a matter of policy therefore South Africa is entitled to refuse to recognize Rhodesian and British claims. If South Africa is entitled to refuse all recognition then surely it is entitled to stop short of this and to grant a partial recognition to each claimant. And what better way of according such/...

168) See supra, pp. 285-295 where the "duty to recognize" is discussed and rejected.

such partial recognition than by recognizing the status quo before the dispute arose? A continuing recognition of the status quo is the most practical way to avoid a legal vacuum while at the same time refusing to pass judgment on the merits of the British-Rhodesian dispute. Support for the view that a state may continue to recognize the status quo ante despite the fact that the parties involved no longer make claims consistent with that position can even be found in recent British practice itself. In Carl-Zeisstiftung v. Rayner & Keeler Ltd.¹⁶⁹⁾ The Foreign Secretary presented a certificate to the court which certified inter alia:

"From the zone allocated to the U.S.S.R., Allied Forces ... withdrew at or about the end of June, 1945. Since that time and up to the present date Her Majesty's Government have recognized the State and government of the U.S.S.R. as de iure entitled to exercise governing authority in respect of that zone ... and ... have not recognized either de iure or de facto any other authority purporting to exercise governing authority in or in respect of the zone."

And yet as Harman, L.J. pointed out in the Court of Appeal:

"It is, in fact, notorious, that the U.S.S.R. has re-recognized the German Democratic Republic as a sovereign state and treats its law-making capacity accordingly." 170)

The position therefore is that the United Kingdom continues to recognize the status quo ante Soviet recognition of East Germany despite the fact that the status quo ante is at variance with the international law claims of the entities involved, the Soviet Union and East Germany. The Soviet Union no longer claims de iure sovereignty over East Germany and the latter claims to be an independent state. It is submitted that /...

169) [1965] Ch. 565: [1965] Ch. 576: [1966] 3 W.L.R. 125.

170) [1965] Ch. at 651.

that this is strong authority for the proposition that continued recognition of a status quo ante is lawful and it is especially so in a relationship which involves the United Kingdom itself since this appears to be United Kingdom practice.¹⁷¹⁾ In fact this precedent from United Kingdom practice goes even further than the South African practice relating to Rhodesia for in the case of East Germany there is no conflict between the claims of East Germany and those of the Soviet Union. The United Kingdom therefore does not have to contend with disputed claims and yet it recognizes the status quo ante Soviet recognition of East Germany.¹⁷²⁾

The overall submission is that South Africa recognizes the international status quo ante U.D.I., that such recognition is not improper and is not affected by the Security Council Resolution of 18th March, 1970,¹⁷³⁾ imposing a duty not to recognize Rhodesia on member states of the United Nations because, as we have argued, this resolution is not retrospective in effect.¹⁷⁴⁾

One further question arises in relation to the South African attitude and that is whether South Africa recognizes Rhodesia in the acknowledging sense. We have seen before that Kelsen drew/...

171) Akehurst, p. 47 says that a state will be estopped from denying the existence of a "rule" if it has acted as if that "rule" were already law. Schwarzenberger, Manual, pp. 300-301 says that when a state relies upon a practice it weakens its position in relation to the practice in that it will not be able to assert the illegality of the practice when resorted to by other states. See further the discussion on estoppel in the context of Southern Rhodesia being a self-governing territory between 1946 and 1965. Supra, pp. 102-103.

172) East Germany claims to be a party to several conventions but the United Kingdom refuses to recognize this. For a list of the relevant conventions see O'Connell, I, p. 287.

173) S. Res. 277 (1970).

174) Supra, pp. 315-317.

drew a distinction between recognition in the political sense and recognition in the legal sense of the word.¹⁷⁵⁾

A.J.G.M. Sanders has examined this question in relation to Rhodesia and has concluded, and with respect correctly, that South Africa recognizes Rhodesia in the acknowledging sense but not in the declaratory sense.¹⁷⁶⁾ He says:

"Die Suid-Afrikaanse stellingname dat dit Rhodesië se onafhanklikheid nie erken nie, is 'n aanduiding dat dit nie sy bedoeling is om deur die uitruil van diplomatieke verteenwoordigers Rhodesië ook inderdaad as 'n volkeregtelike subjek te behandel nie. Dat Suid-Afrika deur die aangaan van die genoemde ooreenkoms en die uitruil van diplomatieke verteenwoordigers in feite Rhodesië se onafhanklikheid en ook die effektiwiteit van die Rhodesiese staat en regering wel erken (bevestigende erkenning), kan beswaarlik ontken word; ... Om op te som: Suid Afrika erken Rhodesië in die bevestigende sin, egter nie in die verklarende sin nie." 177)

The fact however that South Africa recognizes Rhodesia in the acknowledging sense has no legal consequences for as we have seen this is not recognition in the legal sense.¹⁷⁸⁾

There are two other hypothetical points which concern Zambia and New Zealand respectively in relation to recognition of Rhodesia.

President Kaunda/...

- 175) Supra, pp. 269-270. See too Lauterpacht, p. 23 who says that there is a distinction between the acknowledgment of independence and recognition and that this is especially reflected in United States practice.
- 176) Note 50 supra, pp. 264, 267.
- 177) Ibid., p. 264. Sanders says here too that "... Suid Afrika se standpunt dat hy nie Rhodesië se onafhanklikheid en effektiwiteit as 'n staat erken nie, moet dan ook met 'n korrekte politieke sout geneem word." The writer is in agreement that indeed South Africa recognizes Rhodesia in the acknowledging sense but his interpretation of the policy statement in question, in so far as it relates to recognition (in the legal sense), is different from that of Sanders who interprets the policy statement that South Africa does not recognize Rhodesia's independence to mean that the South African Government does not consider Rhodesia to have one of the characteristics of statehood, viz. independent government (p. 263). The writer, with respect, interprets the policy statement in question to mean that South Africa is not prepared to accord the legal status of independence (i.e. full international personality) to the State of Rhodesia. He does not interpret it as a denial of the fact of the existence of independent statehood in Rhodesia.
- 178) Supra, p. 270.

President Kaunda of Zambia when announcing the rapid expansion of Zambia's army and air force on 9th December, 1965 is reported to have informed the National Assembly that any Rhodesian interference with the Common Services "will be a declaration of war on Zambia and I shall not hesitate to order my country into action".¹⁷⁹⁾ In the event of a state of war occurring between Rhodesia and Zambia as a result of such interference, there would probably be a limited recognition of Rhodesia by Zambia under which the former would enjoy the rights, and be subject to the duties, of a belligerent power in time of war. It is submitted however that President Kaunda's statement could not, in itself, amount to recognition. Any recognition flowing from it would be conditional on the outbreak of hostilities amounting to war and would probably also be limited to the creation of a belligerent capacity in Rhodesia in respect of the hostilities in question.

In January, 1972 a former Southern Rhodesian Prime Minister, New Zealand-born Mr. Garfield Todd and his daughter Judith were detained in Rhodesia. They were later released but restricted to their farm.¹⁸⁰⁾ On 10th February, 1972 New Zealand's most powerful journalists organization at Auckland demanded that the New Zealand Government should investigate what it described as the illegal imprisonment of Mr. Todd and his daughter.¹⁸¹⁾ If the New Zealand Government were to act/...

179) The Times, 10th December, 1965, p. 10 (a).

180) Cape Times, 3rd March, 1972.

181) Cape Times, 11th February, 1972.

act on this suggestion and were to call on the Rhodesian Government to observe the minimum standard of treatment for aliens prescribed by international law and release the Todds,¹⁸²⁾ this would be tantamount to a limited recognition of Rhodesia for the purpose of the reciprocal observance of the rules in question.¹⁸³⁾ However, an attempt to exercise protection in respect of the Todds could possibly meet with the answer that protection would be incompetent on the ground that they were also Rhodesian nationals - if that indeed is the case!¹⁸⁴⁾

SECTION VII

CONCLUSIONS ON RHODESIAN INTERNATIONAL PERSONALITY.

In Section III of this chapter it was submitted that the Constitutive theory was the preferable theory relating to recognition. In the last section it was submitted that no state recognizes Rhodesian independence. The writer's conclusion from these two propositions is that Rhodesia is not a full international person in its relationship with any other subject of international law.¹⁾

Even/...

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- 182) On the minimum standard see Sorensen, pp. 483-489. Akehurst, pp. 111-123.
- 183) See discussion supra, pp. 196-201 on the phenomenon of limited recognition by calling upon an entity to observe some specific rule or rules of international law.
- 184) On the exclusion of protection where the individual claimant enjoys the nationality of the defendant state see R.Y. Jennings, "The Commonwealth and International Law" (30) B.Y.I.L., 1953, p. 320 at p. 347.
- 1) If the Declaratory theory is correct, the inevitable conclusion is of course that Rhodesia is a full subject of international law since, as we submitted in section II of this chapter, Rhodesia is an independent state. This viewpoint has in fact been expressed by C. A. Crause, "Enkle Opmerkings oor Besluite van die Veiligheidsraad ten opsigte van Rhodesië" (29) T.H.R. -H.R., 1966, p. 320 at pp. 330-332; J.A.Coetzee, The Sovereignty of Rhodesia and the Law of Nations, Pretoria, 1970; A.J.G.M. Sanders, "Die Erkenning van State en Regerings" (33) T.H.R. -H.R., 1970, p. 259 at p. 263.

Even though Rhodesia does not have full personality it does enjoy limited international personality in the following respects.

- (1) Rhodesia has a limited international personality in relation to the member states of the Organization of American States. Here by virtue of Articles 6 and 9 of the Charter of the Organization, which in this respect may be regarded as a stipulation pour autrui, it enjoys certain basic rights against the members.²⁾ This personality exists independently of the fact that none of the member states in question recognize Rhodesia because Article 9 specifically so provides and creates an exception to the general constitutive role of recognition. Alternatively Articles 6 and 9 can be construed as a form of limited recognition subject to a suspensive condition in favour of such entities as shall in the future fulfil the requirements of statehood. On this construction the provisions of the Articles in question would harmonize with constitutive doctrine, basic rights flowing from the limited recognition accorded.³⁾ The personality enjoyed against member states of the O.A.S. cannot however be a full international personality because Article 10 of the Charter would appear to require full recognition for the enjoyment of full rights in international law by a state.⁴⁾ The limited international personality which exists here however is important when one considers that it exists against the United States of America which is a member state of the O.A.S.

The/...

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- 2) Supra, pp. 261-262.
3) Supra, pp. 262-265.
4) Supra, pp. 260, 261.

The content of the personality consists of the rights which Rhodesia enjoys in accordance with Article 9. These are

"the right to defend its integrity and independence, to provide for its preservation and prosperity, and consequently to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other states in accordance with international law."

In my view the limitation on the states' rights in the last sentence mentioned assumes important proportions in the case of Rhodesia. For it would enable member states of the O.A.S. to take lawful action against Rhodesia in accordance with valid United Nations Resolutions. Without such a limitation it could conceivably be argued that member states of the O.A.S. could not rely upon the authorization of the United Nations by way of justification for infringing these basic rights of Rhodesia because Rhodesia is not a member of the United Nations. But it is clear that in terms of Article 9, the enjoyment of the basic rights in question is subject to the exercise of international law rights by other states.

- (2) Rhodesia also has a limited international personality in its relationship with South Africa. This follows from the earlier submission that South Africa continues to recognize Rhodesia as it was prior to the 11th November, 1965.⁵⁾ The content of this personality has already been described⁶⁾ and it need not be repeated here. This personality does not exist against any other state because other states, as pointed out, recognize the complete sovereignty of the United Kingdom over Rhodesia,⁷⁾ a recognition which South Africa alone refuses to accord.⁸⁾

(3)/...

5) Supra, p. 374.
6) Supra, pp. 105-119.
7) Supra, pp. 365-366.
8) Supra, pp. 368-369.

- (3) Rhodesia still possesses a limited international personality as a member state of various international organizations.⁹⁾ Personality is here relative in that it only exists against other member states of the organization in question. Personality is further limited in content in that it only embraces the rights and duties incidental to membership of the organization. As we previously pointed out there is here an implied but limited recognition for the purposes of the organization¹⁰⁾ and this recognition gives rise to the limited rights in question.

On the 18th March, 1970 the Security Council of the United Nations passed a resolution¹¹⁾ in paragraph 12 of which it

"Calls Upon Member States to take appropriate action to suspend any membership or associate membership that the illegal regime of Southern Rhodesia has in the specialized agencies of the United Nations."

In paragraph 13 the Security Council

"Urges Member States of any international or regional organisation to suspend the membership of the illegal regime from their respective organizations and to refuse any request for membership from that regime."

If Rhodesia were to be expelled from any organization, naturally it would cease to have the rights and duties incidental to such membership. If it were merely suspended its rights and obligations might be in abeyance during the currency of such suspension. With
one/...

9) Supra, pp. 105-106.

10) Supra, pp. 185-188. Naturally there cannot be any question of such membership implying full recognition of Rhodesia as an independent state because at the time Southern Rhodesia first attained such memberships it was not, nor did it claim to be, an independent state. Strictly speaking therefore, the memberships in question are possessed by "Southern Rhodesia" and not by "Rhodesia".

11) S. Res. 277 (1970).

one doubtful exception, it would appear that Rhodesian membership of international organizations has been neither terminated nor suspended.¹²⁾ The possible exception is W.H.O. in which Rhodesia's associate membership may be suspended. After 1966 no budgetary contributions were received in respect of Rhodesian membership. In response to a letter of 19th March, 1969 referring to Southern Rhodesian's arrears of contributions, the United Kingdom Ministry of Health, in a letter dated the 22nd May, 1969 stated that while Southern Rhodesia remained an associate Member of W.H.O., the Declaration of Independence in 1965 had the consequence that the associate membership was in suspense so far as Southern Rhodesia's enjoyment of it was concerned. Financial transactions between the Organization and the regime (including the payment of contributions) had been suspended until the return of legality in Southern Rhodesia.¹³⁾ The United Kingdom delegate to the Committee on Administration, Finance and Legal Matters of the Organization made a statement confirming the view that Southern Rhodesian membership was in suspense.

There/...

12) For action taken by I.T.U., of which Rhodesia was a member, see S/9853, Annex III, pp. 7-9; for W.M.O., of which it was also a member, see *ibid.*, p. 19; for G.A.T.T., of which it was also a full member, see *ibid.*, p. 3; for F.A.O., of which it was an associate member, see *ibid.*, p. 2; for I.B.R.D., in which it formed part of United Kingdom membership, see *ibid.*, p. 4; for U.P.U., in which it formed part of the British overseas group, see *ibid.*, pp. 12-13. The acceptance of the credentials of the Rhodesian Government in organizations of which Rhodesia still is a member is of course a different question, which will later be discussed. See *infra*, pp. 427-429. In addition we might mention that several international organizations and agencies of the United Nations, in whose membership Rhodesia did not participate, took action in the Rhodesian situation but these actions are naturally irrelevant to the question of the existence of Rhodesian personality. These include I.C.A.O., U.N.C.T.A.D., U.N.E.S.C.O., U.N.I.D.O., see S/9853, Annex III, pp. 5, 6, 10, 11; Economic Commission for Latin America, International Committee of the Red Cross, S/9853, Annex IV, pp. 2, 3; United Nations' High Commissioner for Refugees, S/9853, Add. 1, Annex III, pp. 2-3.

13) S/9853, Annex III, p. 14.

There was no comment on this statement,¹⁴⁾ but on 26th May, 1970, the Executive Board of the Organization adopted a resolution in which it decided to recommend to the Health Assembly that in 1972 and future years the contribution of Southern Rhodesia to the Organization should be placed in the Appropriate Section for Undistributed Reserve of the annual appropriation resolution.¹⁵⁾

From the above it would appear that Southern Rhodesian associate membership of W.H.O. is in suspense but this probably means that only its rights are in abeyance while its obligations continue, e.g. the obligation to contribute. The United Kingdom attitude however, is that both rights and obligations are in abeyance.

We may now conclude that Rhodesia has personality, and thus rights and duties, incidental to its membership of certain international organizations but that in the case of W.H.O. its rights as an associate member are, in all probability, in suspense.

SECTION VIII

IMPLICATIONS OF LIMITED RHODESIAN PERSONALITY.

Rhodesia has international law rights and duties only in the spheres in which its limited international personality is operative.¹⁾ Beyond these spheres it has no personality and hence no rights and duties in international law. The implications of this will now be examined in relation to two types of conduct of Rhodesia and the conduct of other entities against Rhodesia. The basic inquiry in each case is into the lawfulness or otherwise of the conduct in question, and the degree of Rhodesian personality plays a substantial role in such determinations.

(1)/...

14) Ibid., p. 15.

15) Resolutions EB46. R20. For text see S/9853, Annex III, p. 16.

1) Supra, pp. 378-382.

(1) Rhodesian conduct.

Rhodesia's conduct will only be an international tort or a breach of duty to other subjects of international law, if it has two characteristics.

- (a) It must be an infringement of an objective norm or rule of international law.

It goes without saying that if the conduct in question does not infringe international law rules, it cannot be a tort in any case.²⁾ Thus, none of the following acts on the part of Rhodesia can amount to an international tort or breach of obligation to the power against which the conduct is directed: refusing to allow British aircraft to refuel at Salisbury;³⁾ curbing of payments for gifts and maintenance to residents of Britain;⁴⁾ the severance of the connection between the Rhodesian currency and sterling;⁵⁾ the prohibition of the transfer of funds from Rhodesia to United Kingdom insurance companies;⁶⁾ the stoppage of coal supplies to Zambia (which did not in fact materialize though threatened) and the raising of the price of coal (in the form of the imposition of a Royalty) to Zambia (which did materialize but which the

Rhodesian/...

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- 2) This requirement will always be present regardless of the identity of the potential tortfeasor. For the elements of an international tort see Schwarzenberger, I, pp. 571-576.
- 3) The Times, 24th December, 1965, p. 6 (f).
- 4) The Times, 4th December, 1965, p. 8 (b).
- 5) The Times, 29th January, 1966, p. 7 (f).
- 6) The Times, 17th December, 1965, p. 10 (e). This was done in retaliation for the British prohibition on the transfer of funds by British Insurance Companies to meet claims in Rhodesia inter alia. The Times, 17th December, 1965, p. 16 (c). This led to cancellation of Lloyd's registration and in fact favoured Rhodesia's balance of payments because in the past Rhodesian insurance had resulted in a net inflow of funds to Britain. Premiums were now retained in Rhodesia against claims. The Times, 30th December, 1965, p. 12(c)(d).

Rhodesian government was later willing to forego;⁷⁾ the insistence on payments by Zambia in currencies other than sterling;⁸⁾ the banning of Zambian currency;⁹⁾ the suspension of oil supplies to Zambia;¹⁰⁾ the threat to repatriate aliens to Zambia and Malawi if their jobs were required by redundant Rhodesians;¹¹⁾ dismissal of non-Rhodesians only from R.I.S.C.O. as a result of diminished manpower needs because of the closure of furnaces on losses of steel sales;¹²⁾ the declaration of the Rev. Donald Abbott and his wife, both Americans, as prohibited immigrants followed by an order to leave; the refusal to allow the Rt. Rev. Games Pike, Episcopalian Bishop of California entry as a prohibited immigrant.¹³⁾ None of the above acts on the part of the Rhodesian authorities are illegal in international law because, in the absence of a treaty, there is no obligation on a state not to do these acts. They are unfriendly but quite legal acts.¹⁴⁾

(b)/...

- 7) The Times, 26th November, 1965, p. 13 (b); 30th December, 1965, p. 6 (a); 3rd January, 1966, p. 8 (f).
- 8) The Times, 30th December, 1965, p. 8 (d).
- 9) The Times, 22nd November, 1965, p. 8 (f).
- 10) This action was stated to be taken because of the diversion by Britain of a Norwegian tanker carrying oil for both Rhodesia and Zambia. The Times, 21st December, 1965, p. 8 (a).
- 11) The Times, 9th December, 1965, p. 10 (b)(c). See too J.E.S.Fawcett, "Security Council Resolutions on Rhodesia" (41) B.Y.I.L., 1965-1966, p. 103 at p. 117.
- 12) The Times, 3rd February, 1966, p. 12 (g).
- 13) The Times, 30th December, 1965, p. 8 (d)(e).
- 14) Obviously the possible number of such acts is infinite. The instances listed serve merely as examples, many of which, on analysis may amount to the employment of the device of Retortion, as to which see Sorensen, p. 753. Retortion is in essence an extra-legal concept employed to denote unfriendly acts which keep within the bounds of the law. In the absence of a treaty obligation to the contrary, Rhodesia's action in closing the border with Zambia is quite legal though it is, of course, an unfriendly act. Cape Times, 10th January, 1973.

- (b) The conduct in question must be committed in a sphere in which Rhodesia enjoys international personality.

Naturally where Rhodesian personality is relative the conduct must be in relation to a state against whom Rhodesian personality exists.¹⁵⁾

Thus, for example, Rhodesia is included in the membership of the British Overseas Territories in U.P.U.¹⁶⁾ and as such has the rights and obligations stipulated in the Universal Postal Convention, 1964. As such it has an obligation to forward mail originating in other member countries.¹⁷⁾ Thus the suspension of all mail services from Kenya, Uganda and Tanzania on 6th February, 1966¹⁸⁾ was prima facie a breach of the convention unless it could be justified as a reprisal¹⁹⁾ for similar action later by the East African countries on 15th December, 1965.²⁰⁾

So too Rhodesia was comprised in United Kingdom membership of I.B.R.D.²¹⁾ The World Bank loaned money for the construction²²⁾ of Kariba. Rhodesia and Zambia had obligations to pay for this and Britain was guarantor of the Kariba "mortgage".²³⁾ In December/...

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- 15) Half-sovereign states can commit international delinquencies in so far as they have an international status and corresponding international duties of their own. See Oppenheim, International Law, 8th ed., London, 1955, p. 339.
- 16) G.A.Coddington, The Universal Postal Union, Coordinator of the International Mails, New York, 1964, pp. 80-85; p. 265; Supra, p. 105.
- 17) Sorensen, p. 639.
- 18) The Times, 7th February, 1966, p. 8 (f).
- 19) On reprisals see Sorensen, pp. 753-755.
- 20) The Times, 16th December, 1965, p. 8 (g). The legality or otherwise of the refusal to handle Rhodesian mail by certain other members of U.P.U. will be discussed infra, pp. 398, 427-428.
- 21) Supra, p. 105.
- 22) The Times, 14th December, 1965, p. 8 (g).
- 23) The Times, 6th December, 1965, p. 10 (f)(g).

December, 1965 Rhodesia refused to meet its obligations to the World Bank, then totalling one hundred and eight million pounds.²⁴⁾ This would be a prima facie breach of Rhodesia's obligations in a sphere where it possessed international personality unless it could justify its action on some other ground such as necessity or impossibility.²⁵⁾ The World Bank attitude was that if Rhodesia did not meet her obligations, the United Kingdom would be held responsible as guarantor.²⁶⁾ In the same way as refusal to meet commitments due in respect of Kariba to the World Bank was a prima facie breach of international law by Rhodesia, so too, it is submitted that interruption of power facilities to Zambia from Kariba would involve a breach of obligations,²⁷⁾ unless again this could be justified on some other basis such as reprisal. In relation to Kariba, Rhodesia has treaty obligations and thus this is a sphere in which its personality is operative.

On the other hand unless Rhodesian conduct can be brought within the narrow confines of the spheres in which its personality exists, it cannot be categorized as unlawful and as such

Rhodesia/...

24) Ibid.; The Times, 9th December, 1965, p. 10 (b)(c)

25) See Schwarzenberger, I, pp. 538-543. These doctrines are discussed infra, pp. 714 et seqq. in relation to United Kingdom obligations relating to Rhodesia. It may possibly be inferred that Rhodesia is relying on these doctrines to escape its commitments to the World Bank. See Statement of Mr. Ian Smith on 4th December, 1965 that "as Britain has now seized Rhodesia's London reserves and imposed trade and financial sanctions of the greatest severity upon Rhodesia, I must make it clear to the people of Britain and to the World at large that it is quite obviously impossible for Rhodesia, much as she desires, to meet her debt obligations ... to the World Bank" The Times, 6th December, 1965 p. 10 (f)(g).

26) The Times, 10th December, 1965, p. 19 (b).

27) The Times, 26th November, 1965, p. 13 (b); Fawcett, note 11 supra, p. 117.

Rhodesia incurs no international responsibility for it - even if it is objectively an infringement of international law. We might say that Rhodesia has no imputability or toerekeningsvatbaarheid for such conduct. Thus, for instance, Rhodesia would bear no responsibility for the arrest of Ramotse and others carried out in Botswana by the Rhodesian police.²⁸⁾ So too Rhodesia need not accord sovereign immunity to non-recognizing states before its courts; it would not be responsible for refusing to pay interest, rents, profits and dividends to persons and firms resident in Britain; for placing such sums in blocked accounts²⁹⁾ and for failing to meet its obligations to pay interest on Rhodesian loan funds.³⁰⁾ If Rhodesia were a fully recognized state, failure to meet such obligations to non-Rhodesians would in all probability be a breach of the minimum standard of treatment owing to aliens and as such a breach of international law.³¹⁾

Finally, to take an extreme example, a non-recognizing state could not complain of a breach of international law even if it were the victim of Rhodesian aggression. All such relations are extra-legal and will remain so as long as recognition is withheld from Rhodesia. Non-recognizing states cannot be heard to complain of hardship in these cases for the remedy lies in their own hands. If they wish Rhodesia to have full international/...

28) S. v. Ramotse (unreported judgment of the T.P.D. of 14th September, 1970 - discussed in (83) S.A.L.J., 1971, pp. 13-14.)

29) The Times, 4th December, 1965, p. 8 (b).

30) The Times, 6th December, 1965, p. 10 (f)(g). The possibility of United Kingdom responsibility for Rhodesian loans is discussed infra, pp. 615-617, 652-657.

31) Serbian and Brazilian Loans case (1929) P.C.I.J. A 20/21, p. 18.

international law duties towards them, they can simply impose such duties by recognizing Rhodesia. If they wish to impose limited duties in specific fields (or even single duties), they can accord a recognition which is limited to the imposition of such duties only.³²⁾ Thus an international law duty not to commit aggression could be imposed by another state simply calling on Rhodesia to observe international law in this respect.³³⁾ This would constitute an implied recognition of Rhodesia limited to the field in which international law norms relating to aggression applied. In all these cases, as we previously submitted, the imposition of duties would be purchased at a price which is the undertaking of reciprocal duties vis-à-vis Rhodesia by the state affording implied recognition.³⁴⁾

Despite the fact that Rhodesian personality exists in an extremely limited field, it has been asserted that various Rhodesian activities contravene international law though they clearly fall outside that field as described by us. These assertions have previously been examined and it was submitted
that/...

32) Supra, pp.196-197,203-205. Limited recognition for particular purposes would not, it is submitted, contravene S. Res. 277 (1970) because in so far as recognition of the state of Rhodesia is concerned this resolution prohibits only recognition of the Republic of Rhodesia. Supra, pp.312-313. This would certainly extend to full de iure recognition of the Republic, and probably also to de facto recognition of the same entity but would probably not extend to other forms of limited recognition. The resolution also contains prohibitions on the recognition of the Government of Rhodesia. This does not arise here and is discussed infra, pp.423-424.

33) Supra, pp. 196-197.

34) Supra, p. 197.

that there was one obvious argument which must apply to each of these allegations of unlawfulness.³⁵⁾ An unlawful act in international law can only be committed by an entity which enjoys personality in that system. To talk of unlawful acts without conceding a personality to the actor is a contradiction in terms. The lack of personality in Rhodesia in relation to the acts in question seems to be a conclusive answer to allegations of infringements of international law.³⁶⁾

Apart altogether from lack of personality in the actor, the question whether the alleged conduct objectively conflicts with international law is extremely debatable. Let us therefore see what the particular assertions of unlawfulness on Rhodesia's part are. McDougal and Reisman assert as follows:³⁷⁾

"... the list of indictments of Rhodesian transgressions against international law is alarmingly long. As far as conventional international law is concerned, the Rhodesian authorities have repudiated a number of Security Council decisions They have also repudiated the human rights provisions of the Charter ... and the prescriptions of the increasingly authoritative Universal Declaration. As far as international customary law is concerned, they have violated the more traditional human rights policies in a degree which ... would have in the past served to justify 'humanitarian intervention' by individual nation states As far as 'general principles' are concerned, the Rhodesian elites have violated the principle of good faith by failing to make effective assurances which they gave the United Kingdom at various times for just treatment of the African population. The act of unilateral declaration of independence and the subsequent internal legislation violated... the principle of self-determination ... as well as British Sovereignty ... the assertion of independence was an act of irresponsibility in violation of the most basic policies of the Charter for the maintenance of international order."

Repudiation/...

- 35) "Rhodesia and the United Nations; the Lawfulness of International Concern: a Qualification " (2) C.I.L.S.A., 1969, p. 454 at pp. 456-457.
- 36) It is assumed for the purposes of argument that the allegations made are factually correct. The question whether there can be international responsibility on the part of the individual human beings who allegedly perpetrated the acts under consideration is discussed infra, pp. 465-468.
- 37) "Rhodesia and the United Nations: The Lawfulness of International Concern" (62) A.J.I.L., 1968, p. 1 at pp. 11-12.

Repudiation of Security Council resolutions by Rhodesia is no infringement of international law. In the first place, Rhodesia is not a member of the United Nations and so is not subject to the provisions of Article 25 of the Charter. In the second place, the provisions of Article 2 (6) applying to non-members are probably juristically ineffective because they attempt to bind a non-party to the Charter without its consent.³⁸⁾ Thirdly, if we examine the provisions of Article 2 (6) of the Charter, they do not in terms impose obligations on non-members of the United Nations. Instead they attempt to give the United Nations competence to act against non-members.³⁹⁾ Kelsen, discussing Article 2 (6), says that the legal competence of a special organ is not the mere reflection of a duty on the part of the individuals who are subjected to the authority of the special organ. Thus even though Rhodesia might conceivably be subjected to action by the Security Council that does not mean that it has a duty to observe the decisions of the Council.⁴⁰⁾

Repudiation of the human rights provisions contained in the Charter of the United Nations is not necessarily a breach of international law. In the first place Rhodesia is not a member of the United Nations and in the second place it is doubtful if

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- 38) C.A.Crause, "Enkele Opmerkings oor Besluite van die Veiligheidsraad ten opsigte van Rhodesië " (29) T.H.R -H.R., 1966, p. 320 at pp. 332, 333, 334.
- 39) Crause, note 38 supra, p. 335 considers such action to be illegal. "Dwangaksie van die V.V. teen 'n nie-lid van die organisasie en teen die wil van daardie nie-lid, is niks anders as 'n verbreking van die algemene volkereg nie." This, with respect, goes too far. For if action by the United Nations against a non-member is justified in terms of international customary law, the non-member cannot complain of a breach. See the writer, note 35 supra, pp. 460-461.
- 40) H. Kelsen, "The Draft Declaration on Rights and Duties of States" (44) A.J.I.L., 1950, p. 259 at p. 264. For further discussion of this see the writer, note 35 supra, pp. 460-461.

the provisions in question impose legal duties in the matter of human rights even on member states.⁴¹⁾

Repudiation of the human rights provisions in the Universal Declaration is not necessarily a breach of international law. Rhodesia is not a party to the Declaration, the Declaration, in any event, was a merely moral instrument at its inception and it has not subsequently been transformed by custom into an instrument embodying legal obligations.⁴²⁾

The allegation of violation of traditional human rights such as would have justified humanitarian intervention is also incorrect. There were no human rights in the traditional system of international law. Where humanitarian intervention took place this did not necessarily presuppose a breach of international law by the power against which intervention took place. In any event the right of humanitarian intervention was not established beyond doubt in the traditional system. Finally, the right is now certainly obsolete in the light of the provisions of Article 2 (4) of the Charter of the United Nations which prohibits the use of force against the territorial integrity of a state.⁴³⁾

The allegation of violation of good faith is not legally relevant. For mere violation of good faith does not amount to a violation of international law. The assurances referred to operate only on the municipal law or constitutional level.⁴⁴⁾

The/...

41) See discussion ibid., pp. 462-463; see too discussion on human rights infra, pp. 521-527.

42) See the writer, note 35 supra, pp. 463-464; infra, pp. 527-542.

43) For further discussion see the writer, note 35 supra, pp. 464-465.

44) See discussion ibid., p. 465.

The allegation of violation of the principle of self-determination is not necessarily an allegation of a violation of international law. Self-determination has, in all probability, not established itself as a legal right in international law. Thus it cannot be used by the Rhodesians as a shield or by anyone else as a sword against them.⁴⁵⁾

Infringement of British Sovereignty is not a breach of international law either. For international law does not proclaim British sovereignty over palm and pine as far as the inhabitants of British territory are concerned. These have liberty to revolt and secede, if they can do so, just as the mother country has liberty to crush the revolt or secession, if it can do so. International law prohibits neither species of conduct.⁴⁶⁾ Infringement of British Sovereignty may be, and, in the Rhodesian case, undoubtedly was, a breach of municipal law,⁴⁷⁾ but not of international law.

The allegation of irresponsibility in violation of Charter policy for the maintenance of order is probably legally irrelevant. An act contrary to United Nations "policy" is not necessarily an infringement of international law - especially in the case of a non-member.⁴⁸⁾ If, on the other hand, the allegation means that the conduct of Rhodesia was a "threat to the peace" within the meaning of Article 39, then the allegation has legal relevance, for the Security Council may take/...

45) See ibid., pp. 458-460; infra, pp. 519-521.

46) Supra, pp. 137-138.

47) Supra, pp. 133-135.

48) See the writer, note 35 supra, p. 465.

take action in such a case.⁴⁹⁾ But even though the Security Council may take action to remedy the "threat to the peace" that is not to say that the conduct of the state deemed to a "threat to the peace" is illegal. Illegality on the part of the state involved is no prerequisite for the legality of Security Council action to remedy the "threat to the peace" arising from such conduct.⁵⁰⁾

Our conclusion must be that even if we assume the factual accuracy of the various allegations made, that the allegations have no substance as allegations of infringement of international law.

(2) Conduct of other entities which may be said to be prejudicial to Rhodesia.

The conduct of other states against Rhodesia can only be an international tort or an infringement of rights if it has the following two characteristics.

(a) It must be objectively a breach of international law.

If the conduct does not infringe a norm of international law it cannot be a wrong against Rhodesia. At most, it is an unfriendly but quite legal act. Various states have taken various actions against Rhodesia which are of an unfriendly character. It would be impossible to enumerate all such actions. A few salient examples will be given for the purposes of illustration.⁵¹⁾
Thus/...

49) On the legality of such action against a non-member of the United Nations, see note 39) supra.

50) See the writer, note 35 supra, pp. 454-456.

51) No British action against Rhodesia will be given by way of example. The various actions which the United Kingdom has taken against Rhodesia will be described later when the position of the United Kingdom itself is discussed. See infra, pp. 620-631.

Thus Australia ceased trading, imposed restrictions on the entry of Rhodesians into Australia as well as travel and currency restrictions.⁵²⁾ Austria severed trade relations with Rhodesia.⁵³⁾ Belgium promulgated ministerial orders on the importation of Rhodesian goods, the export of Belgian goods to Rhodesia and the transit of Rhodesian products through Belgium.⁵⁴⁾ Botswana refused to allow the transit of petroleum, arms and ammunition on the South African-Rhodesian railway, terminated flights between Francistown and Bulawayo and eliminated the importation of Rhodesian tobacco and beer.⁵⁵⁾ Canada introduced a complete ban on trade with certain humanitarian exceptions.⁵⁶⁾ The Congo (now Zaire) cut all economic and commercial ties with Rhodesia.⁵⁷⁾ Cyprus imposed comprehensive mandatory trade sanctions against Rhodesia.⁵⁸⁾ Denmark announced a complete embargo on trade with Rhodesia and closed its consulate.⁵⁹⁾ The Federal Republic of Germany terminated commodity trade.⁶⁰⁾ France suspended the services of its airline U.T.A. to Salisbury,⁶¹⁾ and prohibited the transportation of commodities or products to or from Rhodesia.⁶²⁾ Greece prohibited the transportation of certain cargoes from Rhodesia on its merchant ships⁶³⁾ and brought all trade to a standstill.⁶⁴⁾

Hong Kong/...

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- 52) S/9853, Annex II, p. 2.
53) Ibid., p. 3.
54) Ibid., p. 4.
55) Ibid., p. 5.
56) Ibid., p. 9.
57) The Times, 2nd February, 1966, p. 11 (b).
58) S/9853, Annex II, p. 11.
59) Ibid., p. 14.
60) Ibid., p. 17.
61) The Times, 24th February, 1966, p. 10 (g)
62) S/9853, Annex II, p. 20.
63) The Times, 15th March, 1966, p. 8 (g).
64) S/9853, Annex II, p. 21.

Hong Kong banned imports of tobacco.⁶⁵⁾ India imposed a total ban on trade, implemented United Nations decisions on immigration and carriage of goods, banned remittances to Rhodesia and excluded the latter from the list of Commonwealth countries for the purposes of exchange control.⁶⁶⁾ Iran instructed the oil companies operating in the Iranian consortium not to sell crude oil to Rhodesia.⁶⁷⁾ Iraq broke off economic relations.⁶⁸⁾ Italy interrupted economic and commercial relations.⁶⁹⁾ Jamaica ceased trade, communications and social relations.⁷⁰⁾ Japan revised its position relating to trade, remittance of funds, transportation, entry of Rhodesians and emigration to Rhodesia.⁷¹⁾ Kenya prohibited trade, trans-shipment of goods, financial transactions including remittances to Rhodesia and all forms of communication. Residents of Rhodesia were prohibited from entering Kenya.⁷²⁾ Jordan would not recognize Rhodesian passports and cut telephone and telegraph communications with Rhodesia.⁷³⁾ Luxembourg subjected all trade and the transit of goods to licence and refrained from issuing such licences.⁷⁴⁾ The Malagasy Republic prohibited all trade and access to Rhodesian ships and aircraft.⁷⁵⁾ Malawi abrogated a trade agreement with Rhodesia and suspended financial dealings with

Rhodesia/...

65) The Times, 15th December, 1965, p. 8 (f).

66) S/9853, Annex II, p. 23.

67) The Times, 23rd November, 1965, p. 11 (f).

68) Ibid., 13th December, 1965, p. 7 (e).

69) S/9853, Annex II, p. 25.

70) Ibid., p. 26.

71) Ibid., p. 27.

72) Ibid., p. 28.

73) The Times, 17th December, 1965, p. 10 (e); 30th December, 1965, p. 6 (b).

74) S/9853, Annex II, p. 31.

75) Ibid., p. 32.

Rhodesia.⁷⁶⁾ Libya and Malaysia announced a complete trade embargo with Rhodesia.⁷⁷⁾ The Netherlands implemented the sanctions decreed by the Security Council.⁷⁸⁾ New Zealand prohibited all relations, trade and otherwise with Rhodesia.⁷⁹⁾ Niger prohibited trade and air communications with Rhodesia.⁸⁰⁾ Nigeria placed an embargo on all trade with Rhodesia.⁸¹⁾ Norway ceased all trade and other relations.⁸²⁾ Singapore placed a complete ban on exports and imports.⁸³⁾ Sudan instituted a boycott against Rhodesia.⁸⁴⁾ Sweden implemented Security Council resolutions.⁸⁵⁾ Switzerland banned the export of arms and ammunition to Rhodesia, temporarily blocked the Rhodesian Reserve Bank's account in the Swiss National Bank and took steps to prevent Rhodesia using Switzerland as a funnel for exports to West Europe. For the latter purpose all Rhodesian goods entering Switzerland required import licences and these would not be granted above the normal volume of imports in recent years.⁸⁶⁾ Trinidad and Tanzania announced complete Trade embargoes.⁸⁷⁾ Uganda prohibited all dealings.⁸⁸⁾ The Soviet Union/...

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- 76) The Times, 19th November, 1965, p. 10 (d); 9th December, 1965, p.9(b). The latter measure was taken pending discussions on ways in which Malawi could pay for imports from Rhodesia since Rhodesia refused to accept payment in sterling.
- 77) The Times, 8th December, 1965, p. 8 (f).
- 78) S/9853, Annex II, p. 37.
- 79) Ibid., p. 38.
- 80) Ibid., p. 40.
- 81) The Times, 8th December, 1965, p. 8 (f).
- 82) S/9863, Annex II, p. 42.
- 83) Ibid., p. 46.
- 84) Ibid., pp. 47-51.
- 85) Ibid., p. 52.
- 86) The Times, 18th December, 1965, p. 5 (d).
- 87) Ibid., 8th December, 1965, p. 8 (f).
- 88) S/9853, Annex II, p. 53.

Union prohibited all trade and other relations.⁸⁹⁾ The United Arab Republic broke off economic relations.⁹⁰⁾ The United States prohibited trade.⁹¹⁾ So too did the Republic of Vietnam.⁹²⁾ Zambia refused to recognize Rhodesian passports and travel certificates,⁹³⁾ removed Commonwealth preference on many commodities imported from Rhodesia, prohibited Zambian dealings on the Salisbury stock exchange, banned Rhodesian currency,⁹⁴⁾ required visas on the part of Rhodesian citizens entering Zambia and the signing of a declaration on entry renouncing the Smith regime,⁹⁵⁾ restricted various payments to Rhodesia, imposed general import and export control requiring licences for all but essential commodities, and introduced surveillance of the border.⁹⁶⁾ Further, it continued to reduce its trade with Rhodesia.

None of the above described conduct is objectively an infringement of international law and so, in the absence of a treaty duty to the contrary, cannot be illegal, even if it were committed against a fully recognized subject of international law.⁹⁷⁾

- (b) The conduct must be committed in a sphere in which Rhodesian personality exists and it must be committed by an entity against which Rhodesian personality exists.

Rhodesia/...

89) Ibid., p. 55.

90) The Times, 13th December, 1965, p. 7 (e).

91) S/9853 Annex II, p. 56.

92) S/9853/Add. 1, Annex I, p.4.

93) The Times, 19th November, 1965, p. 10 (d).

94) Ibid., 22nd November, 1965, p. 8(f).

95) Ibid., 3rd December, 1965, p. 11 (a).

96) Ibid., 7th December, 1965, p. 10 (d).

97) S/9853/Add. I, Annex I, p. 5.

Rhodesia as we have seen possesses a limited personality against South Africa.⁹⁸⁾ Thus, for instance, it might be argued that the freezing of Rhodesian assets in South Africa by the Reserve Bank (reluctantly and under pressure from the Bank of England) was a breach of international law.⁹⁹⁾ So too Rhodesia continues to enjoy the membership of certain international organizations and as such is entitled to the rights incidental to such membership.¹⁰⁰⁾ Denial of these rights would be a prima facie breach of international law. Thus, for instance, refusal to handle Rhodesian mail by India,¹⁰¹⁾ Kenya,¹⁰²⁾ Mali,¹⁰³⁾ the Soviet Union,¹⁰⁴⁾ Jordan¹⁰⁵⁾ and seven other countries¹⁰⁶⁾ was prima facie a breach of the Universal Postal Convention.¹⁰⁷⁾ We have also seen how Rhodesia enjoys a limited personality embodying certain basic rights against member states of the O.A.S.¹⁰⁸⁾ Thus, for instance, hypothetically, aggression by any one of these states against Rhodesia would be an infringement of the basic rights of the latter and thus an international tort.

On the other hand where the conduct, though objectively it would be a tort against a fully recognized subject of international law, is committed in a sphere in which Rhodesian personality/...

98) Supra, p. 379.

99) The Times, 22nd December, 1965, p. 8 (g).

100) Supra, pp. 380-382.

101) S/9853, Annex, p. 23.

102) Ibid., p. 28.

103) Ibid., p. 34.

104) Ibid., p. 55.

105) S/9853 Add I, p. 4.

106) S/9853, Annex III, p. 12.

107) The breach is only a prima facie one and there are further factors to consider which are connected with the recognition of the Government of Rhodesia and the capacity of the latter to issue postage stamps which must be recognized for the purpose of prepayment of postage in other countries. The matter is discussed infra, pp. 427-428 where the recognition of the Government of Rhodesia is considered.

108) Supra, pp. 378-379.

personality does not exist, it is not an international tort against Rhodesia. Thus Kenya removed and impounded cargoes bound for Rhodesia at Nairobi.¹⁰⁹⁾ The United States annulled the sale of thirty six heavy diesel locomotives to Rhodesia¹¹⁰⁾ and refused to allow the importation of 9,500 tons of Rhodesian sugar already sold and on the seas in transit.¹¹¹⁾ The United Kingdom blocked the payment of income from sterling securities to Rhodesian residents.¹¹²⁾ It also seized the assets of the Reserve Bank of Rhodesia held abroad.¹¹³⁾ Hypothetically other states need not accord the right to sue and sovereign immunity to Rhodesia before their courts nor admit the validity of the internal acts of the Rhodesian Government.¹¹⁴⁾ Hypothetically, not even aggression would be an international tort against Rhodesia.¹¹⁵⁾ Thus the alleged conduct of subversive broadcasts by Zambia containing incitement to murder and sabotage in Rhodesia, even if true,¹¹⁶⁾ the affording of facilities to para-military forces in Zambia for the purpose of armed incursions into Rhodesia, the conditional declaration of war made by President Kaunda in the event of Rhodesian interference with the common services, the threat to use force in the form of military operations by President Kaunda,¹¹⁷⁾ the threat by/...

109) The Times, 14th December, 1965, p. 8 (g).

110) Ibid., 13th November, 1965, p. 10 (c).

111) Ibid., 22nd November, 1965, p. 10 (g).

112) Ibid., 12th November, 1965, p. 12 (e).

113) Ibid., 4th December, 1965, p. 8 (a).

114) Gelston v. Hoyt, 3 Wheat. 246; Rose v. Himely (1808) 4 Cranch 241; The Nereide (1815) 9 Cranch 388; The Annette; The Dora [1919] P.105; City of Berne v. Bank of England (1804) 9 Ves. Jun. 347.

115) Thus Quincy Wright "The Chinese Recognition Problem" (49) A.J.I.L., 1955, p. 320 at p. 333 says that if Chiang Kai Shek and the communists attacked each other, neither could be accused of aggression.

116) The Times, 5th March, 1966, p. 7 (d)(e); 9th March, 1966, p. 13 (a).

117) The Times, 10th December, 1965, p. 10(a); 31st December, 1965, p. 9(a).

by Ghana to use military force,¹¹⁸⁾ would not be international torts against Rhodesia. Aggression against Rhodesia would however have the following implications:

- (i) It would constitute a tort against the United Kingdom whose sovereignty over the territory is recognized by all states except South Africa.¹¹⁹⁾ Schwarzenberger says:

"So long as Rhodesia is not recognized as a subject of international law, the only country against which any breach of the rule of territorial inviolability has been committed is the United Kingdom, and the United Kingdom may be thought to have waived its right of international complaint on this score." 120)

- (ii) If the aggressor is a member state of the United Nations, aggression would be a breach of its obligation under Article 2 (4) to refrain from the threat or use of force, but no wrong would be committed against Rhodesia as such.
- (iii) The individual human beings responsible for such aggression would in all probability, commit an international crime against peace.¹²¹⁾

Finally, we must consider action taken by the United Nations against Rhodesia.¹²²⁾ Crause has asserted that such action is illegal.

"Dwangaksie van die V.V. teen 'n nie-lid van die organisasie en teen die wil van daardie nie-lid, is niks anders as 'n verbreking van die algemene volkereg nie."

He goes on to say that the action of the Security Council

"....mag/

118) The Times, 13th November, 1965, p.10 (c)(d).

119) Supra, pp. 365-366.

120) "Terrorists, Hijackers, Guerrilleros and Mercenaries" (24) C.L.P., 1971, p. 257 at p. 278.

121) See discussion of the international responsibility of the individual in the context of responsibility of the individual members of the Rhodesian Government. Infra, pp.465-468. The same principles are applicable here mutatis mutandis.

122) Action such as that taken under S. Res.221 (1966); S. Res. 232 (1966); S. Res. 253 (1968); S. Res. 277 (1970).

"... mag 'n uitdrukking van magspolities wees, maar dit het beslis nie sy grondslag in die algemene volkereg nie ..." 123)

It is submitted however that the actions taken by the United Nations against Rhodesia were lawful if only for the reason that if they were to be unlawful, they would have to infringe the rights of an international person. A wrong in any legal system can only be committed against a legal person. Rhodesia's personality does not operate in the spheres in which this conduct has taken place. Hence other states and international persons (such as the United Nations) cannot owe it duties and commit wrongs against it in these spheres.¹²⁴⁾

The above acts on the part of states and international organizations against Rhodesia are lawful because of lack of Rhodesian personality.

In practice, however, such lack of personality does not have such drastic consequences as might at first sight be thought. Retaliation by the state in question is always a possibility and will serve to check at least some kinds of activity by other states against it.¹²⁵⁾ Many kinds of relations falling short of international law relations may be maintained with such an entity.¹²⁶⁾ But there are certainly inconveniences which usually result from lack of personality attributable

to/...

123) Crause, note 38), supra, p. 335.

124) See the writer, note 35) supra, pp. 465-466.

125) Lauterpacht, pp. 52-53.

126) Ibid., p. 53.

to non-recognition. Amongst these the principal inconveniences are the following: the inability to sue in the courts of other states and claim sovereign immunity before such courts; non-recognition of the acts of its government as having the customary legal effect in other states; no diplomatic immunity for its representatives;¹²⁷⁾ the experiencing of difficulty in changing its money; getting official quotations from other states for the same; getting financial assistance; the uncertainty surrounding its concessions (which is not encouraging for foreign capital for development) and non-recognition of its passports.¹²⁸⁾

Chapter IV/...

- 127) See the writer, "Status of Rhodesia in International Law", Acta Juridica, 1967, p. 44.
- 128) Sir John Fisher Williams, "La doctrine de la reconnaissance en droit international et ses développements récents" (44) H.R., 1933, II, p. 203 at p. 243.

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